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I. INTRODUCTION: HATE, THE FUNCTIONS OF SCHOOLING, AND THE FIRST AMENDMENT IN THE PUBLIC SCHOOLS

The First Amendment-free speech landscape has changed, or at least many are reexamining it. Commentators now regularly question traditional analysis of limitations on speech and expressive activity. They observe that some types of speech, while historically protected by the First Amendment, nevertheless are hateful and harmful to their recipients and, furthermore, that the United States is virtually alone in the Western world in its unrelenting protection of such hurtful and oftentimes subjugating speech.[1] The emerging critique and reconsideration of the First Amendment pits rights of freedom of expression against principles of equality and pits the libertarian vision against the communitarian vision. The debate over restraints on certain types of harmful speech is occurring on two levels—the societal and the educational—as hate incidents, virulent attacks based upon race, ethnic origin, religion, sex, and sexual preference, have become disturbingly frequent.[2]

On the societal level, the First Amendment critique has taken several forms. Some advocate the regulation of pornography,[3] for example, urging that it subjugates women, undermines sex equal-

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1. *See* LEE C. BOLLINGER, THE TOLERANT SOCIETY 38-39 (1986); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2341-48 (1989); Martha Minow, *Speaking and Writing Against Hate*, 11 CARDOZO L. REV. 1393, 1397 (1990).

2. Professor Greenawalt has described the dilemma as one involving "the application of philosophical insights to serious practical questions." Kent Greenawalt, *Insults and Epithets: Are They Protected Speech?*, 42 RUTGERS L. REV. 287, 287 (1990). Thus:

> Extremely harsh personal insults and epithets directed against one's race, religion, ethnic origin, gender, or sexual preference pose a problem for democratic theory and practice. Should such comments be forbidden because they lead to violence, because they hurt, or because they contribute to domination and hostility? Or should they be a part of a person's freedom to speak his or her mind?

Id. at 288.

3. *See generally* LAURENCE H. TRIBE, CONSTITUTIONAL LAW §§ 12-17, at 920-28 (2d ed. 1988).

ity, and silences women.[4] Others similarly reject First Amendment absolutism and seek to establish legal limitations on racist speech on the grounds that it contributes to the continued disempowerment and subordination of victim group members and to the continued denial of their civil liberties.[5] Proponents of regulatory measures recognize and acknowledge obstacles created by well-established First Amendment doctrine[6] but claim that pornography and racist speech must be regulated for purposes of protecting and elevating other equally important constitutional values.[7] The pleas for reform require legal recognition of the injuries caused by some language usage, pornography, racial epithets, and the like, and the legal conclusion that the injuries outweigh any possible expressive value of these forms of speech.[8]

In the world of higher education, reports of hate incidents, including racist, sexist, and homophobic speech, as well as deroga-

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4. *See, e.g.*, CATHARINE A. MACKINNON, FEMINISM UNMODIFIED (1987); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985) [hereinafter *Pornography, Civil Rights, and Speech*]; Catharine A. MacKinnon, *Not A Moral Issue*, 2 YALE L. & POL'Y REV. 321 (1984).

5. *See, e.g.*, Matsuda, *supra* note 1.

6. The United States Court of Appeals for the Seventh Circuit struck down an anti-pornography ordinance adopted by Indianapolis, concluding that it unconstitutionally discriminated on the basis of viewpoint. *See* American Booksellers Ass'n v. Hudnut, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986). The Seventh Circuit also struck down a "racial slur ordinance" criminalizing the dissemination of materials promoting and inciting racial or religious hatred. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978).

7. At the same time, the following events have taken place: lawmakers have attempted to outlaw flag desecration, *see* United States v. Eichman, 496 U.S. __, 110 S. Ct. 2404 (1990); Texas v. Johnson, 491 U.S. 397 (1989); the National Endowment for the Arts has proposed restrictions on funding for artists whose projects are deemed offensive or obscene, *see* Allan Parachini, *NEA Modifies Obscenity Guidelines; Arts: The Policy Change Stems From An Apparent Dispute Between the NEA and the Justice Department Over Whether to Appeal a Federal Court Ruling That Struck Down the So-Called Anti-Obscenity Oath*, LOS ANGELES TIMES, Feb. 13, 1991, at 1, col. 4; a federal district court judge has declared 2 Live Crew's rap album *As Nasty As They Wanna Be* to be obscene, *see* Skyywalker Records, Inc. v. Navarro, 739 F. Supp. 578, 603 (S.D. Fla. 1990); and Simon & Schuster, notwithstanding its sizeable advance to author Bret Easton Ellis, has refused to publish *American Psycho* because of its misogynistic content, *see* TIME, Nov. 26, 1990, at 103. Professor Minow has described the current free speech environment as an "odd and disturbing historical junction" due to the juxtaposition of efforts to regulate hate speech and pornography and efforts to prohibit flag burning and to restrict governmental funding of art thought to be offensive. Minow, *supra* note 1, at 1403; *see also* Irving R. Kaufman, *Nibble At Freedom, And Risk Losing It All; First Amendment: Tools Dragged Out to Stifle Hateful Speech Would Disturb Bedrock Principles of Free Expression*, LOS ANGELES TIMES, July 31, 1990, § Metro, Part B, at 7, col. 4 (home ed.) (Judge Kaufman of the United States Court of Appeals for the Second Circuit reporting that the First Amendment doctrine of free expression "is undergoing a re-examination" as a result of, inter alia, the flag burning and public funding of arts issues). Together, these issues are part of a larger, more encompassing debate about the scope of the constitutional right of freedom of speech.

8. *See* MacKinnon, *Pornography, Civil Rights, and Speech*, *supra* note 4, at 61-62; Matsuda, *supra* note 1, at 2357; *see also* KENT GREENAWALT, SPEECH, CRIME, AND THE USES OF LANGUAGE 141 (1989) ("For insults, epithets and slurs, and pornography, two critical questions are: how language is being dominantly used, and whether that use should be made of legal relevance.").

tory speech aimed at religious and ethnic groups are legion.[9] Few institutions of higher learning claim immunity from the resurgence of intolerance and its concomitants of verbal and symbolic discriminatory harassment.[10] Intolerance and its manifestations are particularly problematic in the educational setting, for it is this context in which the Supreme Court has struggled to implement judicial remedies designed to eradicate discrimination.[11] Furthermore, the activities that take place in the classroom today have significant cultural and political implications for the future of society.[12] The recent hate incidents, therefore, generate complex pol-

9. *See, e.g.*, THE NEW REPUBLIC, Feb. 18, 1991 (special issue covering race on campus). For descriptions of recent hate incidents, see Charles R. Lawrence III, *If He Hollars Let Him Go: Regulating Racist Speech On Campus*, 1990 DUKE L.J. 431, 431-34, 459-61; Matsuda, *supra* note 1, at 2320, 2332-33, 2370-73; Rodney A. Smolla, *Rethinking First Amendment Assumptions About Racist and Sexist Speech*, 47 WASH. & LEE L. REV. 171, 176-78 (1990); Patricia Williams, *The Obliging Shell: An Informal Essay On Formal Equal Opportunity*, 87 MICH. L. REV. 2128, 2133-37, 2144-50 (1989); Linda Haviland, Note, *Student Discriminatory Harassment*, 16 J.C. & U.L. 311, 311-14 (1989); John T. Shapiro, Note, *The Call For Campus Conduct Policies: Censorship or Constitutionally Permissible Limitations on Speech*, 75 MINN. L. REV. 201, 201, 205-07 (1990); Evan G.S. Siegel, Comment, *Closing the Campus Gates to Free Expression: The Regulation of Offensive Speech at Colleges and Universities*, 39 EMORY L.J. 1351, 1351-57 (1990).

10. *See* Ken Myers, *Conventioneers Argue Pros, Cons of Restriction on Hate Speech*, THE NATIONAL LAW JOURNAL, Jan. 28, 1991, at 4 (reporting increased incidents of racial harassment in nearly all sectors of post-secondary education). Interestingly, according to some commentators, as bigotry, both subtle and flagrant, has become more pervasive on campuses, the "politically correct" phenomenon, and its requirement that "incorrect" views (*i.e.*, opposing or contrary views) be suppressed, also has surfaced as a form of intolerance and has claimed a presence on many college and university campuses. *See* Nat Hentoff, *'Politically Correct' at NYU Law*, THE WASHINGTON POST, Nov. 3, 1990, at A23 ("Some colleges and universities have become known as p.c. campuses. That is, many students and faculty are obsessed with the need to be politically correct—and with the corollary need to try to suppress ideas they say are offensively incorrect."); *see also* Richard Blow, *Mea Culpa*, THE NEW REPUBLIC, Feb. 18, 1991, at 32 ("One option, the one I usually take, is self-censorship, the keeping of politically incorrect thoughts to oneself. But some white men go further. They repent sins they weren't aware they had committed."); Dinesh D'Souza, *Illiberal Education*, THE ATLANTIC, Mar. 1991, at 51-58 (reporting the transformation of universities in terms of, inter alia, educational purposes, values, and climate); William A. Henry III, *Upside Down in the Groves of Academe*, TIME, Apr. 1, 1991, at 66-69 (reporting "taboos on fields of inquiry" and "bans on language" in many colleges and universities); Hentoff, *supra*, at A23 (reporting a dissenting student's response to the New York University Law School moot court board's withdrawal of a hypothetical case raising the issue of the propriety of giving child custody to a lesbian mother in the wake of student protest that fashioning arguments on the father's behalf would be hurtful to a group of people within the school and thus hurtful to all, and the moot court board's subsequent release of a substitute hypothetical dealing with homeowner tort liability: " 'We were so unwilling to make a politically incorrect argument—or maybe afraid of being perceived as agreeing with it—that we fled to the safety of arguing whether or not homeowners have to trim their trees.' "); *accord* Steve France, *Hate Goes to College*, A.B.A. J., July 1990, at 49 (reporting Professor Gunther's statement that "he feels almost grateful on the rare occasions when a student in his constitutional-law class expresses unpopular, retrograde views against affirmative action or other well-established liberal doctrines.").

11. *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Brown v. Board of Educ., 349 U.S. 294 (1954); *see also* Darryl Brown, Note, *Racism and Race Relations in the University*, 76 VA. L. REV. 295, 312 n.64 (1990).

12. *See* GERALD GRANT, THE WORLD WE CREATED AT HAMILTON HIGH 195 (1988) ("Much of what we become as a nation is shaped in the schoolyard and the classroom.");

icy issues concerning the goals of the academic community. The troublesome episodes of discriminatory speech and harassment also generate legal issues regarding the First Amendment. As one commentator succinctly has framed the issue, "[s]hould a university limit free speech to create a proper environment for learning? Or does the very nature of education require exposure to even offensive speech?"[13]

Faced with the need to respond in some manner to the hate speech surfacing on their campuses, more than two hundred colleges and universities have established anti-discrimination codes containing express provisions regulating verbal and symbolic discriminatory harassment.[14] In crafting regulations, schools have been forced to focus on the two constitutional values of equality and free expression,[15] two values to which they are simultaneously committed. At the same time, however, schools have to come to recognize that absolute protection of abusive speech undermines principles of equality and creates hostile educational environments in which not all students participate equally in the learning process.[16] By necessity, therefore, the efforts of college and university authorities to regulate abusive speech have centered on striking a balance between anti-discrimination policy and equality values on the one hand, and individual rights of freedom of expression within the academic community on the other.[17]

Martha Minow, *On Neutrality, Equality, & Tolerance*, CHANGE, Jan./Feb. 1990, at 17 (schools "are vehicles for success in America").

13. Melissa Russo, *Free Speech at Tufts: Zoned Out*, N.Y. TIMES, Sept. 27, 1989, at A29, col. 2.

14. *See* Myers, *supra* note 10, at 4; *see also* Patricia B. Hodulik, *Prohibiting Discriminatory Harassment By Regulating Student Speech: A Balancing of First-Amendment and University Interests*, 16 J.C. & U.L. 573, 573 n.1 (1990) (listing several specific schools); Siegel, Comment, *supra* note 9, at 1375-76 n.137 (discussing the University of Wisconsin's regulation).

15. *See* Thomas C. Grey, *Responding to Abusive Speech on Campus: A Model Statute*, RECONSTRUCTION, Winter 1990, at 50 (noting the competing values of nondiscrimination and free expression); Hodulik, *supra* note 14, at 573-74 (same); Lawrence, *supra* note 9, at 434 (noting the "tension between the constitutional values of free speech and equality"). *But see* Nadine Strossen, *Regulating Racist Speech On Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 489 ("Combating racial discrimination and protecting free speech should be viewed as mutually reinforcing, rather than antagonistic, goals. A diminution in society's commitment to racial equality is neither a necessary nor an appropriate price for protecting free speech.").

16. An attorney for the University of Wisconsin described the constitutional dilemma in the following way: "Recurring instances of discriminatory behavior undermine institutional efforts to provide equal access to education and to improve the educational environment for all students. They also erode the tolerance that is fundamental to the existence of a university community." Hodulik, *supra* note 14, at 573.

17. *See* Grey, *supra* note 15, at 50 (reporting that Stanford's proposed regulation attempts to balance anti-discrimination values and free expression values); Hodulik, *supra* note 14, at 574 ("Successful and legally-sustainable regulation ultimately requires balancing values associated with equality of educational opportunity and those related to freedom of expression in an academic setting.").

The regulations proposed and adopted by universities do not enjoy universal support, even among individuals seriously committed to the elimination of racism and other types of prejudice, however, for the precise reason that one of the bedrock principles of First Amendment jurisprudence "is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[18] For opponents of the campus regulations, the speech restrictions simply do not accord sufficient sensitivity to individual rights of freedom of expression; indeed, the federal district courts that have considered the issue of hate speech at the college and university level have revealed a hostility towards speech limitations and uniformly have rejected controls at that level.[19]

The debate concerning how to respond to verbal and symbolic harassment, and whether the debate is conceived as one emphasizing the primacy of equality principles, making their fulfillment a precondition to the enjoyment of free speech rights,[20] or whether the debate is conceived as one emphasizing tolerance of offensive and hurtful expression as a societal good,[21] is important, for both society and for post-secondary institutions of learning. Due to the unique status and educational mission of the public schools, the debate, arguably, is more imporant for these institutions. The public schools, perhaps because they reflect society's

18. Texas v. Johnson, 491 U.S. 397, 414 (1989) (citations omitted). *See also* Police Dept. v. Mosley, 408 U.S. 92, 95 (1972) ("But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") (citations omitted).

19. To date, federal district courts have struck down two university hate speech regulations. *See* UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991) (court invalidated the University of Wisconsin System's rule prohibiting discriminatory epithets on the grounds that it was unconstitutionally overbroad and vague); Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989) (court invalidated the University of Michigan's anti-discrimination code on the grounds that it was unconstitutionally overbroad and vague). In addition, a federal district court in Virginia has ruled that the First Amendment protects racist student performances at the college and university level. *See* Iota XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 773 F. Supp. 792 (E.D. Va. 1991).

20. *See, e.g.*, Lawrence, *supra* note 9, at 437. For Professor Lawrence, the debate requires reexamination of the First Amendment, for "the traditional civil liberties position on free speech does not take into account important values elsewhere in the Constitution." *Id.* On this view, free speech is meaningless without the precondition of equality: "[E]ven those values the first amendment itself is intended to promote are frustrated by an interpretation that is acontextual and idealized, by presupposing a world characterized by equal opportunity and the absence of societally created and culturally ingrained racism." *Id.*

21. *See, e.g.*, Strossen, *supra* note 15, at 487-88. According to Professor Strossen, the hate speech issue is merely "the perennial debate" whether courts "should continue to construe the Constitution as protecting some forms of racist expression." *Id.* She views equality and free speech as mutually reinforcing constitutional values, and denies that protecting free speech necessarily results in a diminution in the societal commitment to equality. *See id.* at 489.

dominant values as well as the tensions and conflicts inherent within those values,[22] have not been spared occurrences of verbal and symbolic harassment of particular students or groups of students.[23] The public schools are special places,[24] however, and while they cannot escape societal influences, they ought to be and theoretically are driven by and committed to egalitarian principles and ideals, rather than actual societal practices and biases that may be repressive and discriminatory.[25] With respect to public education, therefore, the hate speech debate constitutes an especially vexing condundrum that requires careful consideration of hate and its underlying causes, the functions of schooling, and First Amendment doctrine.

The discomfort that we feel (and should feel) with the prospect of restrictions on hate speech at the societal level and the college and university level should cause us to pause and to consider fully the implications of regulation, for there are many. Elementary and secondary public schools, however, are different from society and post-secondary educational institutions, enough so that hate speech regulations are philosophically and constitutionally justifiable in that context. Accordingly, public school officials should have the authority to prohibit hate speech (or verbal discriminatory harassment) within the school setting. Public school officials must have the authority to promote norms of basic civility and to establish the preconditions necessary for learning and coexisting to take place.

This authority to regulate involves not a privilege of arbitrary

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22. *See* PHILIP A. CUSICK, THE EGALITARIAN IDEAL AND THE AMERICAN HIGH SCHOOL: STUDIES OF THREE SCHOOLS vii (1983); JOHN I. GOODLAD, A PLACE CALLED SCHOOL: PROSPECTS FOR THE FUTURE 30, 161 (1984).

23. *See, e.g.*, CUSICK, *supra* note 22, at 11 (the issue of race and its attendant conflicts and animosities have dominated some schools); *Should There Be Guidelines for What Can Be Printed in a High School Yearbook*, THE WASHINGTON POST, Oct. 11, 1990, at J7 (reporting that yearbooks at several local high schools contained racist remarks); Katti Gray, *ACLU to Defend E. Islip Teen with Hitler T-Shirt; Student: First Amendment Rights Denied*, NEWSDAY (Nassau and Suffolk), Sept. 21, 1990, at 24 (reporting that a high school principal requested that a student take off a T-shirt with "Adolf Hitler European Tour 1939-1945" emblazoned on the front and including a listing of dates and places that Hitler invaded, with some, London, for example, crossed out to indicate cancelled "performances," for the reason that the teachers and the administration viewed the shirt as anti-Semitic); *The November Report; Hair-Raising Policies*, THE N.Y. TIMES, Nov. 5, 1989, at 60, col. 1 (reporting concern over student T-shirt bearing racial or ethnic slurs).

24. *See* Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503, 506 (1969) (Court noted "the special characteristics of the school environment").

25. *See* Brown v. Board of Educ., 347 U.S. 483 (1954); CUSICK, *supra* note 22, at 1 (schools are committed "to an American version of the egalitarian ideal, that is, to provide each student with an opportunity for social, political, and economic equality"); JOHN DEWEY, DEMOCRACY AND EDUCATION 83 (1916); AMY GUTMANN, DEMOCRATIC EDUCATION 19 (1987).

discretion to censor, but rather the ability to devise a scheme of regulation that comports with principles of equality and equal access to education, the First Amendment as applicable to the public schools, and normative theories of the educational purposes and authorities. One dimension of this power involves thoughtful consideration of hate, its causes, and its effects on target students, perpetrators, and the learning environment.[26] Another dimension of this power requires contemplation of nonregulatory countermeasures, including, inter alia, education and training, designed to elicit student participation in public condemnation and repudiation of hate incidents and to encourage student discussion on the elimination of inter-group conflict and tension.[27]

This article argues that the public elementary, junior high (or middle), and senior high schools, as both a prescriptive matter and a descriptive matter, constitutionally may regulate student hate speech in order to effectuate the constitutional values of equality and free speech. We must support schools in their efforts to combat hate speech and its underlying causes of prejudice and intolerance. Part II articulates the characteristics of colleges and universities and their students, contrasts the unique characteristics of the public schools and their students, and describes the harms inflicted by verbal assaults. Part II also describes the proferred justifications for hate speech regulations at the college and university level. The justifications establishing the constitutional permissibility of hate speech regulations at colleges and universities, justifications based upon doctrine governing adults and their activities, also sustain hate speech regulations promulgated by the public schools. Restrictions on speech that may be imposed on adults in the world-at-large may be imposed without question on children who are students in the public schools. Part III proposes that normative educational values require regulation and, further, that specific constitutional doctrines fixing the boundaries of First Amendment freedoms within the public schools allow for regulation of hate speech in the public schools.

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26. *See* William Kaplin, *The First Amendment and Liberty on Campus*, App. B, at 2 (Jan. 4, 1991) (unpublished manuscript; presented at the American Association of Law Schools 1990 Annual Meeting, Section on Law and Education, Symposium: Racial Harassment on Campus).

27. *See id.*; Minow, *supra* note 1, at 1404-07. Professor Minow has urged, with respect to colleges and universities, that exclusive focus on disciplinary codes and First Amendment arguments is a distraction that "does not directly or adequately address, as a pedagogical matter, the sources and forms of hate; nor does it address, as a political matter, the institutional changes needed to make all members of college and university communities feel welcome and safe." *Id.* at 1406. Accordingly, disciplinary codes are just one "useful tool" in combating prejudice. *See id.*

II. THE PARAMETERS OF THE CURRENT DEBATE ABOUT REGULATING HATE SPEECH: FREEDOM OF EXPRESSION VERSUS EQUALITY

A. HATE SPEECH AND THE HARMS IT GENERATES: THE IMPORTANCE OF CONTEXT

The resurgence of intolerance[28] has taken a variety of forms, from discriminatory conduct to harassing verbal and symbolic speech and expression.[29] Abusive speech consists of epithets or insults[30] reflecting stereotypical notions about race, ethnic origin, religion, sex, and sexual preference. The speaker of epithets and insults intends to degrade and to disparage,[31] whether the epithets or insults are spoken against another in a one-on-one situation or against others in a group situation. In both scenarios, the message is a negative one, attributing what are thought to be less desirable values or human qualities[32] to an individual or to a group and conveying unfavorable appraisals about individual worth based solely upon group membership.[33] Hate epithets and insults thus put down minorities and outsiders,[34] marginalize their value as community members,[35] and reinforce bigoted notions that certain

28. Some have noted the correlation between increases in the number of hate incidents and periods of economic recession. *See* Minow, *supra* note 1, at 1405 (one breeding ground for hate is economic insecurity); Philip Elmer-Dewitt, *Is the Country in a Depression? When the Economy Slumps, So Does the National Psyche*, TIME, Dec. 3, 1990, at 112-13 (escalating racial tension and increased incidents of bias crimes correspond to economic pressures associated with the anticipated national recession). Several other hypotheses include: the perceived return to political conservatism and an attitude of unconcern for minorities; the perceived threats experienced by some white students who believe that they are in academic competition with minorities receiving special treatment; and the decline in minority enrollment at colleges and universities. *See* Haviland, Note, *supra* note 9, at 312-13.

29. *See supra* note 9 and accompanying text; *see also* Hodulik, *supra* note 14, at 573-74 (describing hate incidents experienced by students in the University of Wisconsin system); *cf.* Katharine T. Bartlett & Jean O'Barr, *The Chilly Climate on College Campuses: An Expansion of the "Hate Speech" Debate*, 1990 DUKE L.J. 574, 575-78 (describing campus sexism marking the everyday experiences of female college students).

30. In general terms, "epithets are words and phrases that attribute good, bad, or neutral qualities; but usually epithets are thought of as negative." Greenawalt, *supra* note 2, at 291. "Many strong insults use coarse language in a highly derogatory way . . . ." *Id.*

31. *See* Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 145 (1982).

32. Adjectives like stupid, lazy, dirty, greedy, dishonest, and vulgar, for example, come to mind. *See id.*; Matsuda, *supra* note 1, at 2339-40.

33. *See* Greenawalt, *supra* note 2, at 291-92; *see also* GORDON W. ALLPORT, THE NATURE OF PREJUDICE 181 (1979) (When a speaker employs derogatory terms, "we can be almost certain that the speaker *intends* not only to characterize the person's membership, but also to disparage and reject him.").

34. *See* Greenawalt, *supra* note 2, at 291.

35. *See* Minow, *supra* note 1, at 1406 (solidarity and community stability require "tackling people's misunderstandings and preconceptions about one another"); Brown, Note, *supra* note 11, at 324 ("Language and behavior that demonstrate an obliviousness to minority communities stigmatize those communities and marginalize individual's value as community members.").

group memberships constitute a sufficient enough reason to deny equal treatment and opportunity.[36]

Acknowledgment of the specific harms—to both the target and the speaker and to the others in close proximity[37]—is necessary and calls for a heightened level of consciousness[38] about the ways language can be used to inflict pain and to cause damage to individuals.[39] A more capacious conception of injury and a more

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36. *See* Delgado, *supra* note 31, at 135.

37. The importance of perspective cannot be overemphasized; dealing with hate speech requires standing in the shoes of the target, the victim. Outsider jurisprudence stresses the victim's perspective and grounds its methodology in the victim's social reality and experience. *See* Matsuda, *supra* note 1, at 2324. The idea is to reflect on descriptions of the life experiences of individuals within subordinated groups and, at the same time, to fit those experiences within a realist conception of law (law as politics) and establish prescriptive legal goals that avoid reliance on so-called neutral principles, which tend to shore-up existing power relationships. *See id.* at 2324-26. Victims' stories, therefore, are absolutely essential to the hate speech debate. *See* Lawrence, *supra* note 9, at 458-66; Matsuda, *supra* note 1, at 2326-41; Minow, *supra* note 1, at 1399-1402. In other words, we must strive to think about abusive epithets and insults from a vantage point other than our own, unless, of course, the abusive epithets and insults are about us. *See id.* at 1402; Martha Minow, *The Supreme Court, 1986 Term-Forward: Justice Engendered*, 101 HARV. L. REV. 10, 13-15, 71-74 (1987). Justice Stevens has advocated this approach in connection with equal protection analysis. *See* City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 455 (1985) (Stevens, J., concurring) (evaluating a zoning ordinance affecting a group home from the perspective of a mentally handicapped person). Professor Lawrence has summarized the need to listen to the victims as follows:

> Not everyone has known the experience of being victimized by racist, misogynist, and homophobic speech, and we do not share equally the burden of the societal harm it inflicts. Often we are too quick to say we have heard the victim's cries when we have not; we are too eager to assure ourselves we have experienced the same injury, and therefore we can make the constitutional balance without danger of mismeasurement.

Lawrence, *supra* note 9, at 459.

38. That the current state of thinking may be characterized as clearly lacking this heightened consciousness is evidenced by the tendency of dominant-group members to view hate incidents as aberrations in a society otherwise free from prejudice. *See* Lawrence, *supra* note 9, at 478-79; Matsuda, *supra* note 1, at 2327; Brown, Note, *supra* note 11, at 316-17. For this reason,

> [t]he mainstream press often ignores these stories [of hate and prejudice], giving rise to the view of racist and anti-Semitic incidents as random and isolated, and the corollary that isolated incidents are inconsequential. For informed members of these victim communities, however, it is logical to link together several thousand real life stories into one tale of caution.

Matsuda, *supra* note 1, at 2331 (footnotes omitted).

39. The called-for shift in perspective is intended to avoid traditional, abstract analysis, which is weakened by its detachment from victims' feelings. *See* Lawrence, *supra* note 9, at 459 n.108; Minow, *supra* note 1, at 1399. The detached nature of current analysis takes the form, "if it's speech then there *can't* be any harm emanating from it." Williams, *supra* note 9, at 2134 (footnote omitted). To shift focus, however, is to presume that we know how objectively to discern racism, sexism, homophobia, and other forms of intolerance. In actuality, we cannot presume to know what constitutes these forms of hate because, in the end, their definitions are based on policy choices. *See* Brown, Note, *supra* note 11, at 298. Thus, one problem underlying the hate speech debate is epistemological. *See* Minow, *supra* note 1, at 1397; Brown, Note, *supra* note 11, at 298-303.

In dealing with hate speech, therefore, we must cautiously be aware that traditional epistemology holds that there exists objective truth and objective meaning in language and, further, that traditional epistemology engenders bipolar constructs and notions that a particular phrase either is or is not racist or sexist. *See id.* at 302. In order to understand

expansive view of the people who potentially may suffer injury are indispensable in considering how to respond to hate incidents, particularly those involving words. In the case of primary and secondary public schools, the concern for the well-being of students and their capacity to participate in the learning process are of utmost importance. To the extent that the harms of hate speech affect students in debilitating ways, the quality of education provided by the public schools is compromised.

Epithets and insults based on stereotypical traits associated with historically vulnerable groups have devastating effects on the individuals against whom the assaultive words are directed. The most direct harm is immediate mental or emotional distress.[40] Like a slap in the face, a derogatory epithet or insult causes instantaneous injury, inner turmoil,[41] in large part because it derides some unalterable aspect of the recipient's self-identity, such as race or sex. Professor Delgado has noted that insults of this nature are

> always a dignitary affront, a direct violation of the victim's right to be treated respectfully. Our moral and legal systems recognize the principle that individuals are entitled to treatment that does not denigrate their humanity through disrespect for their privacy or moral worth. . . . A racial insult is a serious transgression of this principle because it derogates by race, a characteristic central to one's self-image.[42]

The ultimate impact of an abusive insult, whether based on race or some other constitutive component of identity, is to deny the victim a sense of dignity, resulting in loss of self-esteem, personal security, and sense of community membership.[43]

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and to deal efficaciously with the harms of abusive language, we must seek to avoid reliance on traditional epistemology and our tendencies toward traditional, bipolar conceptualization. *See* Minow, *supra* note 1, at 1397 (we must "dislodge the basic assumption that analysis depends on a series of either/or choices, founded on binary concepts"); Brown, Note, *supra* note 11, at 302-03 (once traditional epistemology is abandoned, it becomes possible to examine the relationship between knowledge and power and to consider differing interpretive understandings of racism).

40. *See* Delgado, *supra* note 31, at 143. In addition, victims may experience physiological symptoms. *Id.*; Matsuda, *supra* note 1, at 2336. For a discussion of the related harms of racism, see Delgado, *supra* note 31, at 136-43.

41. *See* Lawrence, *supra* note 9, at 452.

42. *See* Delgado, *supra* note 31, at 143-45 (footnotes omitted). Moreover, the harm caused by words, racial or otherwise, is greater when they are spoken in front of others or by an authority figure. *See id.* at 143.

43. *See* David Kretzmer, *Freedom of Speech and Racism*, 8 CARDOZO L. REV. 445, 466 (1987); Matsuda, *supra* note 1, at 2337-38; Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682, 690-91 (1988) ("When their identity as members of a particular religion or race cannot be reconciled with their identity as citizens of a political

From the victim's perspective, hate messages and their stigmatization also cause long-term psychological harm.[44] Hate messages "may cause long-term emotional pain because they draw upon and intensify the effects of the stigmatization, labeling, and disrespectful treatment that the victim has previously undergone."[45] Feelings of isolation and aloneness are not uncommon. The psychological effects of hate messages also reinforce feelings of inferiority and prejudice based upon certain group memberships,[46] causing victims to forego opportunities, to avoid certain places, to engage in self-censorship of speech, and generally to modify their behavior, demeanor, and outlook.[47] Other than changing their own behavior and daily routine, victims of hate speech have few avenues of redress; physical assault is inappropriate and forbidden, and the traditional remedy of more speech within the marketplace of ideas is unlikely to alleviate the hurt or to provide relief.[48]

Epithets and insults based on stereotypes also affect the speaker and other individuals who may be exposed to the verbal assaults. Once a speaker disparages another with words, the speaker may become isolated and experience strengthened commitment to the underlying prejudice that fueled the insult in the first place.[49] Furthermore, a speaker's racial, sexual, or other injurious invective is not without impact on nontarget individuals. For members of the dominant group, feelings of disassociation and guilt may result from hate messages.[50] More significantly, dominant-group members may consider the alleged inferiority of the victim and the victim's group to be a real possibility.[51]

The capability of speech to cause real and substantial damage to individuals is intensified when the individuals are children or young adults, who possess even fewer defense mechanisms for

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community, . . . individuals are denied the opportunity to participate fully in, and find fulfillment through . . . shared ideals."). For a discussion of racial, ethnic, and religious identifications as reflective of major components in the processes of self-definition, self-understanding, and self-realization, see Kenneth L. Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C. L. REV. 303 (1986).

44. *See* Delgado, *supra* note 31, at 146; Greenawalt, *supra* note 2, at 302; Kretzmer, *supra* note 43, at 466; Lawrence, *supra* note 9, at 462.

45. Delgado, *supra* note 31, at 146.

46. *See* Greenawalt, *supra* note 2, at 302. Hate messages, or "verbal tags," contribute to the continued subordination of historically oppressed groups and maintain the compliancy of victims. *See* Delgado, *supra* note 31, at 144-45.

47. *See* Matsuda, *supra* note 1, at 2337.

48. *See* TRIBE, *supra* note 3, § 12-8, at 838-41; Delgado, *supra* note 31, at 146.

49. *See* Matsuda, *supra* note 1, at 2340 n.101 (discussing psychological and sociological evidence of injury to the speaker of hate messages).

50. *See id.* at 2338.

51. *See id.* at 2339-40.

coping with the injury suffered.[52] Abusive insults spoken against a young person, insults that disparage unalterable traits central to self-identification tend to be especially destructive, causing the young person to accept and to internalize the hurtful message and to develop a sense of inferiority.[53]

The emotional distress, affronts to dignity, and feelings of inferiority and disconnectedness from community, in addition to the undesirable consequences to the speaker and to others, produced by hate messages have serious implications for our understanding of how students learn and, therefore, for the practice of education and how schools shape their ethos. The psychological well-being of a student is a prerequisite to meaningful learning experiences; to the extent that a student harbors feelings of subordination and inadequacy, learning will be impaired. This insight was central to the Supreme Court's decision in *Brown v. Board of Education*,[54] where the Court expressly noted that "[a] sense of inferiority affects the motivation of a child to learn," which in turn retards the child's "educational and mental development."[55] An important aspect of the Court's equal protection analysis and consideration of psychic injury was context, for the severity of injury is dependent on the context in which it occurs.[56] In the school context, the safeguarding of a student's psychological well-being, which is a compelling state interest,[57] is critical. The emotional stability and psychological health of students are of constitutional magnitude and must figure centrally in fashioning responses to abusive epithets and insults.

The special nature or context of educational institutions has

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52. *See* Delgado, *supra* note 31, at 147; *cf. id.* at 142-43 (racism and labeling have a more injurious impact on children than on adults).

53. *See id.* at 146.

54. 347 U.S. 483 (1954).

55. Brown v. Board of Educ., 347 U.S. 483, 494 (1954). The Court added that "children's feelings of inferiority as to their status in the community . . . may affect their hearts and minds in a way unlikely ever to be undone." *Id.*; *see also* Delgado, *supra* note 31, at 145 n.67 ("*Brown* turned, clearly, on the stigmatizing effect—the indignity or affront of separate schools—because by hypothesis the schools were equal."); Lawrence, *supra* note 9, at 462 ("*Brown* speaks directly to the psychic injury inflicted by racist speech."); Smolla, *supra* note 9, at 201 (stigma was the heart of the Court's equal protection analysis in *Brown*). The Court has concerned itself with harmful emotional and psychological injury to children in other settings as well. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158 (1944) (parents do not have the religious freedom to require their children to engage in proselytizing in contravention of child labor laws because of possible emotional, psychological, or physical injury to the children).

56. *See* Greenawalt, *supra* note 2, at 291, 300; Lawrence, *supra* note 9, at 437; Strossen, *supra* note 15, at 507.

57. *See* Osborne v. Ohio, 495 U.S. 103, __, 110 S. Ct. 1691, 1696 (1990); New York v. Ferber, 458 U.S. 747, 756-57 (1982); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982).

been grasped by those colleges and universities considering the First Amendment and disparaging epithets and insults. Professor Matsuda has provided a description of colleges and universities that is illuminating in its articulation of their unique features:

> Universities are special places, charged with pedagogy, and duty-bound to a constituency with special vulnerabilities. Many of the new adults who come to live and study at the major universities are away from home for the first time, and at a vulnerable stage of psychological development. Students are particularly dependent on the university for community, for intellectual development, and for self-definition. Official tolerance of racist speech in this setting is more harmful than generalized tolerance in the community-at-large. It is harmful to student perpetrators in that it is a lesson in getting-away-with-it that will have lifelong repercussions. It is harmful to targets, who perceive the university as taking sides through inaction, and who are left to their own resources in coping with the damage wrought. Finally, it is a harm to the goals of inclusion, education, development of knowledge, and ethics that universities exist and stand for. Lessons of cynicism and hate replace lessons in critical thought and inquiry.[58]

The higher education setting thus has two particularly distinctive features: a pedagogical mission and students, generally speaking, of a relatively young age who are not intellectually or emotionally fully grown.[59] It is within this learning environment, and the school's all-encompassing concern for positive student development, that the emotional and psychological harm caused by abu-

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58. Matsuda, *supra* note 1, at 2370-71 (footnotes omitted); *cf.* Brown, Note, *supra* note 11, at 313 (The university is special because it is "a singularly powerful institution in the distribution of wealth. Its primary products, credentials in the form of college degrees, are limited and valuable commodities.").

59. Professor Matsuda also has provided a description of college and university students:

> The typical university student is emotionally vulnerable for several reasons. College is a time of emancipation from a pre-existing home or community, of development of identity, of dependence-independence conflict, of major decision making, and formulation of future plans. The move to college often involves geographic relocation—a major life-stress event—and the forging of new peer ties to replace old ones. All of these stresses and changes render the college years critical in development of one's outlook on life. College students experiment with different passions, identities, and risks. A negative environmental response during this period of experimentation could mar for life an individual's ability to remain open, creative, and risk-taking.

Matsuda, *supra* note 1, at 2370 n.249.

sive insults has become the impetus for weighing First Amendment rights against equality principles.

Although many aspects of the public schools are descriptively and functionally similar, if not identical, to those of colleges and universities, there are dissimilarities as well.[60] Like the post-secondary schools, public schools are charged with pedagogy and engaged in the enterprise of education. Similarly, the population to which they are committed is composed of individuals who are not fully grown. On the other hand, students in the public school systems are younger than their college- and university-level counterparts; they are less intellectually and emotionally developed and hence correspondingly more impressionable and vulnerable.[61] They assertedly are less capable of dealing with the bombardment of ideas and information, and thus, the public schools never have been conceived to be the place for wide-open and robust discussion on any and all matters.[62] State compulsory education laws make pupil attendance mandatory.[63] Moreover, historically standing *in loco parentis* and fulfilling *parens patriae* duties,[64] the public schools are obligated to provide for the safety and well-being of all students, perhaps to a greater degree than required of post-secondary schools.[65] In addition, value inculcation is one of the varied purposes of the public schools, but not of colleges and uni-

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60. As one commentator has noted:

> The "special characteristics" of the elementary and secondary school environment include the fact that students, being compelled to attend school, are a captive audience, that the students are not yet fully developed intellectually or emotionally, that the educational enterprise has an obligation to protect the safety of all students and to provide them with an atmosphere conducive to education, and that the purpose of compulsory education is to inculcate the social, moral and political values of the community (however defined) and, in particular, to prepare the young to participate as citizens in our democratic society.

Betsy Levin, *Educating Youth for Citizenship: The Conflict Between Authority and Individual Rights in the Public School*, 95 YALE L.J. 1647, 1678 (1986) (footnotes omitted). In addition, the public schools have a unique social structure, one that is not replicated at the post-secondary level. *See* Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 810 (2d Cir. 1971). Moreover, college and university campuses are larger than public school buildings and grounds, and students spend proportionately more time there. *See id.* at 808 n.5.

61. *See* Levin, *supra* note 60, at 1678 n.164 (noting that courts frequently emphasize the maturity of college students and the relative impressionability of public school students); William B. Senhauser, Note, *Education and the Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939, 954 n.83 (1987) (same).

62. *See* Smolla, *supra* note 9, at 207 (noting that a university is quite different than a public elementary or high school because it is "a place of uninhibited public discourse and should remain so").

63. *See, e.g.*, MINN. STAT. ANN. § 120.101 (West Supp. 1991).

64. *See* Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); EDMUND E. REUTTER, JR., THE COURTS AND STUDENT CONDUCT 3 (1975).

65. *Cf.* Note, *Administrative Regulation of the High School Press*, 83 MICH. L. REV. 625, 652 (1984) (noting that the public schools are charged with maintaining order).

versities. Loosely situated among a public school's "social, civic, and cultural goals," value inculcation involves efforts to assist students in the development of interpersonal understandings, citizen participation, enculturation, and moral and ethical character.[66]

In light of the student constituency of the public schools, in addition to the *sui generis* objectives of such institutions, the capacity of verbal attacks to cause deep emotional and psychological scars in students and to foster feelings of inferiority is potentially greater in the public schools than in colleges and universities. In short, the frustration of ideals of equality and the subversion of efforts to develop proper environments for learning are alarming and more problematic for the public schools than for institutions of higher education.

B. CONSTITUTIONAL DOCTRINE AND THE JUSTIFICATIONS FOR THE REGULATION OF HATE SPEECH

The promotion and protection of free speech throughout society is the central message of prevailing First Amendment doctrine, which "put[s] the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests."[67] The exalted position of the First Amendment in constitutional jurisprudence is thought to be reflective of and necessary for the safeguarding of values inhering in liberal democratic government.[68] Modern constitutional ortho-

66. GOODLAD, *supra* note 22, at 52-55. Value inculcation is not emphasized in the context of higher education. *See* Senhauser, Note, *supra* note 61, at 954; *see also* Suzanna Sherry, *Speaking of Virtue: A Republican Approach to University Regulation of Hate Speech*, 75 MINN. L. REV. 933, 942 (1991).

67. Cohen v. California, 403 U.S. 15, 24 (1971) (citation omitted).

68. Many have articulated the values of or justifications for freedom of expression. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 3-5, 47-51 (1989) (identifying the values of self-realization and self- determination through individual liberty); BOLLINGER, *supra* note 1, at 8-10, 119-24 (identifying the value of our commitment to tolerance through which we address the problems of intolerance); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6-7 (1970) (identifying the following values of self-realization and governmental operation: self-fulfillment; advancement of knowledge and discovery of truth; participation in political decision making; and promotion of a stable community); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 18-19, 22-27 (1948) (identifying the value of self-government and limiting First Amendment protections to public discussion of political issues); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 5-6, 168-69 (1990) (identifying the value of dissent). For Professor Tribe, the fundamentality of the First Amendment in law precludes a conception of its value "in purely instrumental or 'purposive' terms." TRIBE, *supra* note 3, § 12-1, at 785 (footnote omitted); *see also* GREENAWALT, *supra* note 8, at 16-34

doxy, therefore, while not protective of all expressive activity,[69] does not countenance content-based restrictions of speech,[70] even if the speech consists of assaults based on race, ethnic origin, religion, sex, or sexual preference. This is so because "[t]he capacity of racist [and other] attacks to cause deeply scarring psychic wounds or to undermine the values of racial [and other types of] equality and harmony that make meaningful community possible are discounted as harms too ephemeral to justify content-based speech restrictions."[71] The libertarian model—emphasizing individual rights and autonomy and authorizing governmental action or intervention only when absolutely necessary to prevent one individual from prejudicially interfering with the interests of another[72]—takes a dim view of "[r]aising the level of public discourse or improving sensitivity to communal values . . . ."[73] Nonetheless, the emotional and psychological harms resulting from abusive speech are real and difficult to ignore,[74] even under the

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(discussing consequentialist justifications and nonconsequentialist justifications for freedom of speech).

69. *See, e.g.*, Central Hudson Gas & Elec. v. Public Serv. Comm'n, 447 U.S. 557 (1980); F.C.C. v. Pacifica Found., 438 U.S. 726 (1973); Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam). For a brief discussion of the forms of speech that may be restricted or denied protection altogether, see Matsuda, *supra* note 1, at 2354-56.

70. *See, e.g.*, United States v. Eichman, 496 U.S. __, 110 S. Ct. 2404 (1990); Hustler Magazine v. Falwell, 485 U.S. 46 (1988); Cohen v. California, 403 U.S. 15 (1971); Street v. New York, 394 U.S. 576 (1969).

71. Smolla, *supra* note 9, at 172 n.3.

72. *See* JOHN STUART MILL, ON LIBERTY 141-42 (1859) (G. Himmelfarb ed. 1985). In the words of John Stuart Mill:

> The acts of an individual may be hurtful to others or wanting in due consideration for their welfare, without going to the length of violating any of their constitutional rights. The offender may then be justly punished by opinion, though not by law. As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age and the ordinary amount of understanding). In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences.

Id.

73. Smolla, *supra* note 9, at 174. In contrast, the Aristotelian or communitarian vision that law should bind individuals together in a just community allows for the state to control speech: "Speech that promotes the good life and that affirms values of community, justice, and the rule of law will be fostered and nurtured by the state; speech destructive of those ends will be condemned." *Id.* at 173. For discussions of the reformulation of notions of community and republicanism within the realm of law and politics, see Paul W. Kahn, *Community in Contemporary Constitutional Theory*, 99 YALE L.J. 1 (1989); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986); Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

74. *See supra* notes 28-57 and accompanying text.

libertarian model,[75] as are the numerous hate incidents that have plagued schools across the nation. In the words of Professor Kalven, "[s]peech has *a price*. It is a liberal weakness to discount so heavily the price."[76]

The price of allowing harassing epithets and insults within the school setting is some diminution in equality,[77] another value that figures centrally in the hierarchy of constitutional values. Hate messages directed at students who are members of particular groups cause stigma, one of the very evils that modern equal protection principles seek to eradicate.[78] The problem is that "[t]he constitutional commitment to equality and the promise to abolish badges and incidents of slavery are emptied of meaning when target-group members must alter their behavior . . . because of hate group activity."[79] Thus, when speech reduces itself to the level of epithets and slurs attacking race, ethnic origin, religion, sex, and sexual preference, it is precisely at this point that free speech values and equality values cross and tension develops. In addition, it is precisely at this point that the communitarian vision directly conflicts with the libertarian vision. For this reason, proponents of the regulation of hate speech "must choose whether to fight this battle purely in Aristotelian [or communitarian] terms or whether to meet the libertarians half-way by trying to convince the libertarians that the communal goals of tolerance and equality can be accommodated within the libertarian framework of free expression and an open marketplace."[80] The libertarian commitment to neutral principles[81] of freedom of speech, however, need not become an obsession[82] that forecloses the possibility of regulating

75. After all, speech that disparages and hurts individuals is not easily defended in terms of the values which liberalism seeks to defend. *See supra* note 68.

76. HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA xxii (Jamie Kalven ed. 1988).

77. *See supra* notes 28-57 and accompanying text.

78. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954). In *Regents of the Univ. of Cal. v. Bakke* Justice Brennan emphatically stated: "[R]acial classifications that *stigmatize*—because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism—are invalid without more." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 357-58 (1979) (Brennan, J., concurring in the judgment in part and dissenting in part) (emphasis added) (citations omitted).

79. Matsuda, *supra* note 1, at 2377 (footnote omitted).

80. Smolla, *supra* note 9, at 175.

81. According to Professor Tribe, "neutral principles" are not really so neutral, for the application of seemingly neutral First Amendment principles in particular cases "tilt[s] decidedly in the direction of existing concentrations of wealth and influence." LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 189 (1985); *see also* Matsuda, *supra* note 1, at 2322 (describing our collective commitment to freedom of discourse as "dangerously fickle").

82. *See* TRIBE, *supra* note 81, at 219. In this regard, Professor Tribe's comments go to the heart of the matter:

hate speech within the public schools in a constitutionally permissible way in order to advance equality and to minimize the stigmatization of students.

College and university efforts to combat abusive speech have entailed the search for an analytic methodology that comports with First Amendment principles and, at the same time, affords ample respect to equality. The efforts clearly have been directed towards the accommodation of community values within the libertarian model of freedom of expression as the free trade of ideas in the marketplace. The search has generated heated debate between those constitutional scholars who believe that abusive, hurtful speech should be prohibited and those constitutional scholars who believe that such hateful speech should be immune from all school regulation.[83] Notwithstanding the diametrically opposed First Amendment outlooks, proponents of regulation have articulated theoretical rationales for controls on abusive speech grounded in a range of free speech approaches. And in doing so, they have avoided the abandonment of communitarian virtue.

The First Amendment arguments supporting school regulation borrow from a number of doctrinal approaches.[84] Notwith-

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> Voltaire's grandiose pledge to defend to the death another's right to say that with which the philosophe could never agree is in many respects admirable. *But a commitment to protect evenhandedly the expression of all sentiments can degenerate from an abiding faith in the First Amendment to an obsession with the "alluring abstractions" of neutral principles.* Before one martyrs oneself in the name of free speech on behalf of those who would make atrocity a virtue, one should at least pause to reflect upon the fact that martyrdom has always been stronger proof of the intensity than of the correctness of a belief.

Id. (emphasis added) (footnote omitted).

83. *See* Lawrence, *supra* note 9, at 434 (discussion of the debate); Strossen, *supra* note 15, at 487-91 (same); *see also* France, *supra* note 10, at 44-49. The debate is troublesome in that it "has caused considerable soul-searching by individuals with long-time commitments to both the cause of political expression and the cause of racial equality." Lawrence, *supra* note 9, at 434. Professor Smolla has added:

> A personal dimension to this conflict exists. Many of the more eloquent exponents of controls on racist and sexist speech are persons who often have thought of themselves as libertarians or at least as part of a coalition in which libertarians have been their allies. It is not easy to be portrayed as against free speech and civil liberties by the same persons with whom you have fought so many battles for civil rights.

Smolla, *supra* note 9, at 175.

Professor Strossen, General Counsel to the American Civil Liberties Union, has refused to acknowledge the existence of a dichotomy between free speech and equality. *See* Strossen, *supra* note 15, at 489. She has argued that civil libertarians are committed to both the elimination of discrimination and the promotion of free speech. *See id.* at 488. Accordingly, her characterization of the "debate" is different: "Because civil libertarians have learned that free speech is an indispensable instrument for the promotion of other rights and freedoms—including racial equality—we fear that the movement to regulate campus expression will undermine equality, as well as free speech." *Id.* at 489.

84. Professor Kaplan has prepared a comprehensive shopping list of regulatory

standing the strong presumption against limitations on speech and expressive activity, three constitutionally sanctioned rationales are particularly relevant in thinking about responses to hate speech in the school environment.[85] One strategy of some colleges and universities seeking to restrict hate speech on their campuses is to invoke the fighting words doctrine, a "no value" speech approach. Another regulatory rationale is the "low value" speech approach, which authorizes less than complete protection for some forms of speech when the government can establish a substantial interest for the speech infringement. Other colleges and universities rely upon a "full value" speech approach, establishing internal regulation based upon compelling interests, such as the prevention of psychological harm and the guarantee of equal educational opportunity.[86] Although articulated by colleges and universities to

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rationales, which is contained in the outline of his proposed process for managing the free speech aspects of harassment on campus, and which provides in part:

VI. Internal Regulation: Devising Regulatory Theories (matching the shopping list items—from V [a listing of situations for which internal regulation is a priority] above—to free speech approaches that would support regulation)
  A. "Non-speech" approach
  B. "Speech-neutral" approaches
    1. Expressive conduct combined with non-expressive conduct
    2. Time, place, or manner restrictions
  C. "No value speech" approaches (fighting words)
  D. "Low value speech" approaches
  E. "Full value speech" approaches
    1. Incitement
    2. Captive audiences and invasions of privacy
    3. Compelling state interests: equal educational opportunity
  F. Approaches based on revisionist free speech theories
    1. Protecting against psychic injury
    2. Promoting tolerance and civility

Kaplin, *supra* note 26, App. B, at 3.

85. For discussions of the propriety of rationales grounded in tort law, see Doe v. University of Mich., 721 F. Supp. 852, 862-63 (E.D. Mich. 1989) (intentional infliction of emotional distress); Chad Baruch, *Dangerous Liaisons: Campus Racial Harassment Policies, the First Amendment, and the Efficacy of Suppression*, 11 WHITTIER L. REV. 697, 707-08 (1990) (group defamation); Delgado, *supra* note 31, at 151-59, 175, 179-81 (intentional infliction of emotional distress, defamation, group defamation, and a new tort action for racial insults); Marjorie Heins, *Banning Words: A Comment on "Words That Wound,"* 18 HARV. C.R.-C.L. L. REV. 585, 589-92 (1983) (defamation and group defamation); Lawrence, *supra* note 9, at 462-64 (defamation and group defamation); Strossen, *supra* note 15, at 514-20 (intentional infliction of emotional distress and group defamation); Note, *supra* note 43, at 684-89 (group defamation). State tort law is designed to protect the sensibilities of individuals and to limit the anguish that victims suffer as a result of their victimization. *See* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 112 S. Ct. 501, 509 (1991). For a discussion advocating formal criminal and administrative sanctions for racist speech, see generally Matsuda, *supra* note 1.

86. The "no value" and "full value" regulatory theories fit within the speech-protective "two-tier" analysis under which courts traditionally have evaluated content-based restrictions on speech. Under the two-tier analysis, a content-based regulation of expression is unconstitutional, unless the regulated expression falls into a clearly delineated categorical exception to protection, or the regulation itself is necessary to further a compelling state interest. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 277 (1981); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942); BOLLINGER, *supra* note 1, at 178-81. Accordingly,

address campus hate speech, these justifications have equal application in the context of the public schools.[87]

1) *A "No Value" Speech Approach: The Fighting Words Doctrine*

Since 1942 "fighting words" have constituted a categorical exception to protected speech. In *Chaplinsky v. New Hampshire*[88] the Supreme Court considered the conviction of a Jehovah's Witness who, after being warned by a city marshall that his acts of proselytizing[89] were causing the gathering crowd to grow restless, called the marshall "a God damned racketeer" and "a damned Fascist" and described the government of the City of Rochester as "Fascists or agents of Fascists."[90] The statute under which he was convicted proscribed public insults that were "offensive, derisive or annoying."[91] Plainly, the words of Mr. Chaplinsky were of a political nature.[92] Yet, the Court reasoned that some

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some speech enjoys full, but not absolute, constitutional protection, while other forms of speech, like so-called fighting words and libel, do not enjoy any elevated status or protection. *See* TRIBE, *supra* note 3, §§ 12-18, at 928-44; Note, *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 237, 242-43 (1990). The "low value" approach, in contrast, is a doctrinal development of relatively recent origin and is an intermediate category; speech deemed to fall into this category is thought to be less valuable and thus entitled to less than complete First Amendment protection. *See id.*

87. The analysis of constitutional issues within the debate about hate speech on college and university campuses has relied, to a significant degree, upon cases concerning the public schools. *See, e.g., Doe*, 721 F. Supp. at 863 (citing, inter alia, Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986), and noting that had the University of Michigan anti-discrimination policy "had the effect of only regulating" the speech found in *Bethel* to be unprotected when expressed in a high school, "it is unlikely that any constitutional problem would have arisen"); Hodulik, *supra* note 14, at 576, 579-81 (relying, in part, upon Brown v. Board of Educ., 347 U.S. 483 (1954), and Tinker v. Des Moines Indep. Community Sch. Dist., 393 U.S. 503 (1969), to argue in favor of the University of Wisconsin hate speech regulation); Lawrence, *supra* note 9, at 438-39 (relying on *Brown* to argue in favor of college and university hate speech regulations); Siegel, Comment, *supra* note 9, at 1377 & n.140 (citing numerous cases involving freedom of expression within the public schools as relevant to colleges and universities, and expressly noting that "[a]lthough *Tinker* concerned a public high school, the principles underlying the decision apply with equal force to freedom of expression in the context of a college or university"). There is no principled reason not to consider in the public school context the regulatory justifications developed in the college and university context.

88. 315 U.S. 568 (1942).

89. Mr. Chaplinsky's acts of proselytizing included the distribution of Jehovah's Witness literature and the denouncement of all religion as a "racket." Chaplinsky v. New Hampshire, 315 U.S. 568, 569-70 (1942).

90. *Id.* at 569.

91. *Id.* The state statutory provision provided in full as follows:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.

Id.

92. *See* GREENAWALT, *supra* note 8, at 293.

epithets and insults simply are not protected under the First Amendment:

> [I]t is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, *and the insulting or 'fighting words'—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.* It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[93]

Based upon a limiting construction of the state supreme court,[94] the Court held that the statute was constitutionally sound, for it did no more than prohibit the utterance of face-to-face words likely to cause violence or breach of the peace.[95]

Chaplinsky represents a minor concession to censorship[96] premised on the principle that personal epithets and insults can be without "social value" and do not necessarily contribute in a meaningful way to the "exposition of ideas."[97] Accordingly, the Court unequivocally removed several categories of speech from protection under the First Amendment,[98] including words that

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93. *Chaplinsky*, 315 U.S. at 571-72 (emphasis added).

94. The New Hampshire Supreme Court previously had declared that the statute's objective was the preservation of public order, and therefore it prohibited only those words having a "direct tendency to cause acts of violence" by the person to whom the words were directed. *Id.* at 573. Under the state court's construction, the statute prohibited only those words that "men of common intelligence would understand would be words likely to cause an average addressee to fight." *Id.*

95. *Id.*

96. *See* KALVEN, *supra* note 76, at 80.

97. Two years prior to *Chaplinsky*, the Court had noted a concern with personally provocative and abusive assaults: "Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution, and its punishment as a criminal act would raise no question under that instrument." Cantwell v. Connecticut, 310 U.S. 296, 309-10 (1940).

98. *Chaplinsky*, 315 U.S. at 571-72; BOLLINGER, *supra* note 1, at 179. To attempt to isolate expression thought to be without social value may be viewed as an attempt to "purify" discourse. *See* TRIBE, *supra* note 3, § 12-8, at 839; *cf.* ALEXANDER M. BICKEL, MORALITY OF CONSENT 72-73 (1975) (arguing that a certain civil quality to public discourse is good); Rosenfeld v. New Jersey, 408 U.S. 901, 909 (1972) (Powell, J., dissenting) (noting that a hallmark of civilized society is the level and quality of discourse). On this view, "the First Amendment protects information and ideas but neither all possible ways of packaging them nor all possible ways of unearthing and deploying them." TRIBE, *supra* note 3, § 12-8,

provoke violence or that incite an immediate breach of the peace and words that inflict injury by their mere utterance.

Though nearly fifty years old, *Chaplinsky* remains the leading case on the fighting words doctrine. In subsequent decisions, the Court has neither engaged in rigorous analysis of the doctrine nor outlined its boundaries with any systematic clarity. In a series of opinions, for example, the Court invalidated various breach of the peace and other statutes purporting to proscribe abusive and offensive language on grounds of overbreadth and vagueness.[99] In *Gooding v. Wilson*[100] the Court struck down as unconstitutionally vague and overbroad a Georgia statute criminalizing "opprobrious words or abusive language, tending to cause a breach of the peace,"[101] because earlier state court decisions had applied the statute "to utterances where there was no likelihood that the person addressed would make an immediate violent response,"[102] thereby going beyond the fighting words defined by *Chaplinsky*. Similarly, in *Lewis v. City of New Orleans*[103] the Court invalidated a city ordinance prohibiting "opprobrious language"[104] on the basis of overbreadth, because the prohibition embraced "words that do not 'by their very utterance inflict injury or tend to incite an immediate breach of the peace.' "[105] Notwithstanding the Court's lack of any express elaboration of the contours of the doctrine, however, *Gooding* and *Lewis*, and the subsequent remands of convictions in light of these two opinions,[106] suggest that a key element of the fighting words doctrine is the presence of a serious risk of violence.[107] The context in which the hurtful epithets are

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at 839. The purification of discourse, of course, reasonates with the communitarian model. *See supra* note 73.

99. *See, e.g.*, Kelly v. Ohio, 416 U.S. 923 (1974); Rosen v. California, 416 U.S. 924 (1974); Karlan v. City of Cincinnati, 416 U.S. 924 (1974); Lucas v. Arkansas, 416 U.S. 919 (1974); Lewis v. City of New Orleans, 415 U.S. 130 (1973); Rosenfeld v. New Jersey, 408 U.S. 901 (1972); Brown v. Oklahoma, 408 U.S. 914 (1972); Gooding v. Wilson, 405 U.S. 518 (1972).

100. 405 U.S. 518 (1972).

101. Gooding v. Wilson, 405 U.S. 518, 519 (1972).

102. *Id.* at 528.

103. 415 U.S. 130 (1974).

104. Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974).

105. *Id.* at 133.

106. For a list of cases remanded in light of *Lewis*, see *supra* note 99.

107. *See* BOLLINGER, *supra* note 1, at 180 ("the exception for 'fighting words' has survived a series of different courts and cases testing its limits, though now it is commonly said to be narrowly defined by the case law . . . to apply only to personally insulting remarks made in face-to-face encounters"); GREENAWALT, *supra* note 8, at 294 ("Many observers have concluded that no restriction of abusive speech outside of special settings is constitutionally acceptable unless there is a serious risk of violence."); KALVEN, *supra* note 76, at 106-08; TRIBE, *supra* note 3, § 12-18, at 929 n.9 (the fighting words doctrine has been "narrowly construed" and "restricted"); Heins, *supra* note 85, at 588-89 (the fighting words doctrine has been limited); Smolla, *supra* note 9, at 198-99 (the one kernel of *Chaplinsky* that survives is the concern for "a clear and present danger of a violent physical reaction");

made is thus critical.[108]

The scope of the fighting words doctrine of *Chaplinsky* also must be viewed in the light of *Cohen v. California*,[109] the case in which the Supreme Court explicitly held that the First Amendment protects the emotive part of speech, as well as the cognitive part.[110] The Court recognized that expression is largely a matter of personal taste and style, and that some distasteful and offensive words are chosen as a vehicle of expression precisely for their shock value:

> [M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated.[111]

Cohen thus dictates that "the profane" is to receive constitutional protection; to the extent that *Chaplinsky* intimated otherwise, *Cohen* "weakened the conceptual foundation of the fighting words doctrine."[112]

In responding to abusive speech on campus, various colleges

Strossen, *supra* note 15, at 508-10 (the Court has narrowed the construction of constitutionally permissible prohibitions on fighting words).

108. *See* TRIBE, *supra* note 3, § 12-10, at 850-51; Strossen, *supra* note 15, at 509, 525.

109. 403 U.S. 15 (1971).

110. Cohen v. California, 403 U.S. 15, 26 (1971). In *Cohen* the appellant was convicted under a breach of the peace statute prohibiting "offensive conduct" for wearing a jacket bearing the phrase "Fuck the Draft" in the hallway of the county courthouse. *Id.* at 16-17. The issue presented was whether California could

> excise, as 'offensive conduct,' one particular scurrilous epithet from the public discourse, either upon the theory . . . that its use is inherently likely to cause violent reaction or upon a more general assertion that the States, acting as guardians of public morality, may properly remove this offensive word from the public vocabulary.

Id. at 22-23. The Court reversed the conviction. *Id.* at 26.

111. *Id.* at 26.

112. TRIBE, *supra* note 3, § 12-18, at 929 n.9; *see also* GREENAWALT, *supra* note 8, at 294 ("After *Cohen*, it is extremely hard (without rejecting *Cohen*) to argue that everything that might amount to fighting words is simply without expressive value and thus falls wholly outside the First Amendment."); KALVEN, *supra* note 76, at 110 (the net effect of *Cohen* "is thus to curtail the potential scope of *Chaplinsky* and to extend the protection of the First Amendment to offensive speech."); Heins, *supra* note 85, at 587-88 (*Cohen* imposed limits on the fighting words doctrine); Smolla, *supra* note 9, at 198 n.103 ("*Chaplinsky* is foolishly simplistic . . . in maintaining that emotive speech is *no part* of the family of protected" speech.).

and universities have seized the fighting words doctrine as a theoretical model for regulatory measures. With respect to abusive epithets and slurs, the common direction of *Chaplinsky*, the well-established restrictions on breach of the peace statutes, and *Cohen* "has been to demand very narrowly drawn statutory language focusing on imminent violence."[113] Stanford University,[114] for example, adopted a regulation "intended to clarify the point at which protected free expression ends and prohibited discriminatory harassment begins[;]" thus, the regulation proscribes "personal vilification," that is, intentional face-to-face epithets and insults, directed at individuals or small groups of individuals, which "convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin."[115] In accordance

113. GREENAWALT, *supra* note 8, at 295. *But see* Heins, *supra* note 85, at 588 (arguing on the one hand that the fighting words doctrine has been limited, and on the other "that despite its continuing references to *Chaplinsky* the Court will no longer permit convictions for uttering offensive words to stand, whether the words be insulting, racist, or otherwise abusive"); Strossen, *supra* note 15, at 508-10, 524-25 (arguing on the one hand that the fighting words doctrine has been "substantially limited in scope," and on the other that the doctrine "is no longer good law").

114. Although a private institution, and thus not bound by the First Amendment, Stanford University, like a number of private universities, treats itself as so bound as a matter of policy. *See* Grey, *supra* note 15, at 54; HARVARD UNIVERSITY GAZETTE, Mar. 15, 1991, at 1, col. 4 (reporting, in the context of a debate regarding a student's display of a Confederate flag, President Derek Bok's statement that while there is some question as to what extent the First Amendment is enforceable against private institutions, Harvard University should be concerned with freedom of expression and the power of censorship). For a discussion of First Amendment applicability to private colleges and universities, see Siegel, Comment, *supra* note 9, at 1378-98.

115. STANFORD UNIVERSITY, FUNDAMENTAL STANDARD INTERPRETATION: FREE EXPRESSION AND DISCRIMINATORY HARASSMENT §§ 3-4 (adopted June 1990). The FUNDAMENTAL STANDARD INTERPRETATION provides in full as follows:

> 1. Stanford is committed to the principles of free inquiry and free expression. Students have the right to hold and vigorously defend and promote their opinions, thus entering them into the life of the University, there to flourish or wither according to their merits. Respect for this right requires that students tolerate even expression of opinions which they find abhorrent. Intimidation of students by other students in their exercise of this right, by violence or threat of violence, is therefore considered to be a violation of the Fundamental Standard.
> 2. Stanford is also committed to principles of equal opportunity and non-discrimination. Each student has the right to equal access to a Stanford education, without discrimination on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin. Harassment of students on the basis of any of these characteristics contributes to a hostile environment that makes access to education for those subjected to it less than equal. Such discriminatory harassment is therefore considered to be a violation of the Fundamental Standard.
> 3. This interpretation of the Fundamental Standard is intended to clarify the point at which protected free expression ends and prohibited discriminatory harassment begins. Prohibited harassment includes discriminatory intimidation by threats of violence, and also includes personal vilification of students on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

with *Chaplinsky*, the abusive words must "by their very utterance inflict injury or tend to incite an immediate breach of the peace."[116] Professor Grey, the drafter of the Stanford regulation, adopted the concept of "personal vilification" to outline the contours of fighting words within the discrimination context and to ensure the narrowness of the scope of the prohibited speech.[117] The University of Wisconsin also borrowed key elements from *Chaplinsky*'s fighting words doctrine in drafting its regulation proscribing discriminatory expression.[118]

Parallels between abusive speech and fighting words that incite violent reaction are apparent and have not gone unnoticed. Verbal assaults have immediate, injurious impact, like a slap in the face.[119] By their intended impact, verbal assaults also serve to limit dialogue and discussion and to silence the person to whom they are directed.[120] Professor Lawrence has explained:

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4. Speech or other expression constitutes harassment by personal vilification if it:
   a) is intended to insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin; and
   b) is addressed directly to the individual or individuals whom it insults or stigmatizes; and
   c) makes use of insulting or "fighting" words or non- verbal symbols. In the context of discriminatory harassment by personal vilification, insulting or "fighting" words or non-verbal symbols are those "which by their very utterance inflict injury or tend to incite to an immediate breach of the peace," and which are commonly understood to convey direct and visceral hatred or contempt for human beings on the basis of their sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin.

Id.

116. *Id.* § 4.

117. *See* Grey, *supra* note 15, at 53.

118. *See* Hodulik, *supra* note 14, at 582-84. A federal district court determined that the Wisconsin regulation was unconstitutionally overbroad and vague. *See* UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163, 1181 (E.D. Wis. 1991). Given the court's rationale, the language of the Wisconsin provision is instructive. The Wisconsin regulation exempts from First Amendment protection words that are spoken intentionally and directly to an individual for purposes of demeaning that individual on the basis of certain characteristics and that create an intimidating, hostile, or demeaning environment. The Wisconsin proscription provided in part as follows:

> The university may discipline a student in nonacademic matters in the following situations: (2)(a)For racist or discriminatory comments, epithets or other expressive behavior directed at an individual or on separate occasions at different individuals, or for physical conduct, if such comments, epithets, other expressive behavior or physical conduct intentionally:
> 1. Demean the race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry or age of the individual or individuals; and
> 2. Create an intimidating, hostile or demeaning environment for education, University-related work, or other University-authorized activity.

WIS. ADMIN. CODE § UWS 17.06(2).

119. *See* Lawrence, *supra* note 9, at 452.

120. *See id.* at 452-53.

> Assaultive racist speech functions as a preemptive strike. The racial invective is experienced as a blow, not a proffered idea, and once the blow is struck, it is unlikely that dialogue will follow. Racial insults are undeserving of [F]irst [A]mendment protection because the perpetrator's intention is not to discover truth or initiate dialogue but to injure the victim.[121]

Such assaults do not foster more speech, nor do they assist in the ascertainment of truth; "[t]hey are instead the kinds of words that incite reaction and cause harm without any opportunity for reply."[122] In short, verbal slaps in the face incite reaction on the part of the recipient; sometimes, however, they silence the recipient or cause the recipient to flee.[123] No matter what the response, the degree to which additional speech is discouraged is the same.[124]

Narrowly drawn regulations intended to prohibit discriminatory and abusive speech that is likely to trigger reactions are viable responses. Abusive speech can take many shapes and forms, and a regulation embodying the incitement prong of the fighting words doctrine will effectively redress the harms caused by multitudinous varieties of abusive speech. Still, the question of efficacy remains: do regulations drafted solely in accordance with the incitement to violence strand of *Chaplinsky* reach all of the discriminatory speech that schools may seek to proscribe? Some commentators think not, claiming that by requiring proof of incitement to violence, the prohibition's utility is limited to combating only a very few forms of harmful speech.[125] Furthermore,

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121. *Id.* at 452 (footnote omitted).

122. Hodulik, *supra* note 14, at 583.

123. *See* Lawrence, *supra* note 9, at 452 (discriminatory epithets and slurs may provoke a violent response or may result in silence or flight); *accord* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 14-15 (1965) (discriminatory epithets and slurs do not necessarily result in violent reaction).

124. *See* Lawrence, *supra* note 9, at 452.

125. *See, e.g.*, Baruch, *supra* note 85, at 705 ("While certain instances of racial harassment will undoubtedly fall within the fighting words exception to the first amendment, most instances will not."); Smolla, *supra* note 9, at 199 ("A mere fighting words statute [proscribing verbal assaults directed at a particular individual and presenting a clear and present danger of violent reaction] . . . will reach almost none of the racist and sexist speech that proponents of controls seek to proscribe."); Strossen, *supra* note 15, at 492-93 (claiming that the Stanford rule leaves untouched many harms of abusive speech which advocates of regulation seek to redress). *But see* Grey, *supra* note 15, at 53 (with respect to the Stanford regulation, the term "fighting words" should not "be read to imply that an actual threat or likelihood of violent response is a necessary element for application of the 'fighting words' concept; statements that in themselves constitute 'fighting words' do not become protected speech simply because their immediate victims are, for example, such disciplined practitioners of non-violence, or so physically helpless, or so cowed and demoralized, that they do not, in context, pose a realistic physical threat").

there is an analytical weakness in utilizing the fighting words incitement to violence prong to respond to hate speech: with respect to the " 'fighting words' approach . . . there is an incongruity between the real reason for the [hate speech] policy (avoidance of racially discriminatory humiliation and emotional distress) and the constitutional reason (avoidance of violence), the doctrinal box into which the draftsmen are attempting to make the real reason fit."[126]

The conceptual framework of the fighting words doctrine, however, also embraces words "which by their very utterance inflict injury."[127] The post-*Chaplinsky* restrictions on breach of the peace statutes and the Court's decision in *Cohen* did not address words that injure merely by being spoken. Thus, any conclusion that this second prong is no longer good law may be drawn too quickly, for since *Chaplinsky* the Court neither has elaborated on it on the merits nor rejected it in an express way.[128] Indeed, *Gooding* and *Lewis*, and the subsequent reversals of convictions for "fighting words" in light of these two cases,[129] involved overbreadth and vagueness analyses, not substantive analysis of words that injure.[130]

Significantly, although the first prong of *Chaplinksky*'s fighting words definition was dictum,[131] the Court, in defining fighting words, has cited it with approval on a number of recent occasions.[132] In *City of Houston v. Hill*[133] the Court invalidated as

126. REPORT OF PRESIDENT'S AD HOC COMMITTEE ON RACIAL HARASSMENT, UNIVERSITY OF TEXAS AT AUSTIN (Nov. 27, 1989) *quoted in* Strossen, *supra* note 15, at 515 n.153.

127. Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

128. As one commentator has explained:

> It is important to remember, however, that group epithets can themselves often be fighting words. An account of both branches of this subject is a bit unsatisfactory. Although dispositions that evade certain critical issues and hints thrown out here and there have led most observers to agree about the drift of the Supreme Court's understanding, *it has been some decades since the Court has actually attempted to elaborate with clarity what counts as punishable fighting words and whether or not "defamation" of entire classes of people can be punished*; even when the Court has spoken to these matters, it has hardly been with systematic rigor.

GREENAWALT, *supra* note 8, at 293 (emphasis added).

129. *See supra* note 99 and accompanying text.

130. *See* Delgado, *supra* note 31, at 173 n.241.

131. *See* Strossen, *supra* note 15, at 508.

132. *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130, 133 (1974) (citing *Chaplinsky* and *Gooding* and noting that fighting words are those words which "by their very utterance inflict injury or tend to incite an immediate breach of the peace"); Gooding v. Wilson, 405 U.S. 518, 522 (1972) (citing *Chaplinsky* and noting that fighting words are "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace").

133. 482 U.S. 451 (1987).

overbroad a city ordinance forbidding speech that interrupted a police officer in the performance of his or her duties.[134] In reaching its conclusion, however, the Court in no way questioned the authority of states and municipalities to prohibit fighting words, which, importantly, the Court (citing *Chaplinsky* and *Gooding*) defined both as words that inflict injury by their very utterance and words that tend to incite an immediate breach of the peace.[135] Moreover, in *Doe v. University of Michigan*[136] the federal district court observed that if the University's hate speech regulation proscribed only fighting words, as defined in *Chaplinsky* to include both words that injure merely by being uttered and words that tend to incite violent reaction,[137] "it is unlikely that any constitutional problem would have arisen."[138] In light of these developments, Justice Powell's dissent in *Rosenfeld v. New Jersey*[139] from the Court's vacation and remand of a conviction for "fighting words" is informative:

> Perhaps appellant's language did not constitute "fighting words" within the meaning of *Chaplinsky*. . . . But the exception to First Amendment protection recognized in *Chaplinsky* is not limited to words whose mere utterance entails a high probability of an outbreak of physical violence. It also extends to the willfull use of scurrilous language calculated to offend the sensibilities of an unwilling audience.[140]

Regulations proscribing discriminatory and abusive speech intended to cause injury and to offend are not necessarily foreclosed by the case law[141] and deserve consideration, because their broader theoretical underpinning allows for greater reach in terms of the harms sought to be redressed.[142]

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134. *See* City of Houston v. Hill, 482 U.S. 451, 467 (1987).
135. *See id.* at 463 n.12.
136. 721 F. Supp. 852 (E.D. Mich. 1989).
137. *See* Doe v. University of Mich., 721 F. Supp. 852, 862 (E.D. Mich. 1989).
138. *Id.* at 863.
139. 408 U.S. 901, 903-09 (1972) (Powell, J., dissenting).
140. Rosenfeld v. New Jersey, 408 U.S. 901, 905 (1972) (Powell, J., dissenting).
141. Presented with the question of the constitutional permissibility of a school regulation prohibiting abusive speech that inflicts injury by its very utterance, the Court would not need to overrule any cases in order to sustain the regulation. *See* GREENAWALT, *supra* note 8, at 295 & n.33. At a minimum, the Court "could say 'this precise issue has not been presented." *Id.* at 295 n.33.
142. Nearly all of the fighting words cases have involved words spoken to police officers. *See, e.g.*, Lucas v. Arkansas, 416 U.S. 919 (1974); Lewis v. City of New Orleans, 415 U.S. 130 (1974); Brown v. Oklahoma, 408 U.S. 914 (1972); Gooding v. Wilson, 405 U.S. 518 (1972); *see also* Stephen W. Gard, *Fighting Words As Free Speech*, 58 WASH. U. L.Q. 531, 548 (1980) (noting that fighting words cases in the lower courts almost always involve words spoken to police officers); Strossen, *supra* note 15, at 512 (agreeing with Professor Gard's

2) *A "Low Value" Approach: The Sliding-Scale of Social Value*

In contrast to the "no value" speech approach, under which some types of speech, such as fighting words, are categorically exempted from First Amendment protection,[143] the "low value" speech approach accords some types of speech "lower value" by virtue of their content. This is done by balancing competing interests and generally by allowing governmental regulation for purposes of promoting less-than-compelling state interests.[144] The theory driving this approach holds that certain forms of expression inherently lack social value[145] and fail to advance "the historical, political, and philosophical purposes that underlie the [F]irst [A]mendment."[146] Pursuant to this doctrinal model, in a departure from the traditional two-tier conception under which speech either is or is not protected,[147] the Court has fashioned intermediate categories of expression, categories deemed to occupy lower rungs on the recognized hierarchy of First Amendment values and, therefore, entitled only to variable First Amendment protection. In effect, the Court has charted a course of judicial reclassification of certain types of speech, a course requiring judicial assessment of the value of the category of speech at issue. Among the intermediate categories of speech that members of the Court have designated as low value are offensive speech,[148] child pornography,[149] near-obscene speech,[150] and commercial speech.[151]

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assertion). Indeed, the addressee in *Chaplinsky* was a police officer. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 570 (1942). Police officers, of course, enjoy positions of relative power vis-a-vis the speakers. *See* Lawrence, *supra* note 9, at 453 n.92. Recently, the Supreme Court apparently has recognized this power discrepancy and suggested that the *Chaplinsky* fighting words doctrine has narrower application in cases involving words directed at police officers. *See* City of Houston v. Hill, 482 U.S. 451, 462 (1987) (quoting *Lewis*, 415 U.S. at 933 (Powell, J., concurring)). The Court's willingness to vacate and remand convictions based upon overbreadth and vagueness doctrines when the offended party is a police officer, however, does not require the Court to follow the same course when the victim of a verbal assault is instead the member of a historically subordinated and vulnerable group. Lack of relative power is a significant distinction, one suggesting the validity of a different result in the case of the victim who is verbally assaulted on the basis of some trait stereotypically attributed to the group of which the victim is a member.

143. *See supra* notes 88-142 and accompanying text.

144. *See* Note, *supra* note 86, at 243.

145. *See* Philip J. Prygoski, *Low-Value Speech: From Young to Fraser*, 32 ST. LOUIS U. L.J. 317, 318 (1987). *See generally* TRIBE, *supra* note 3, § 12-18, at 928-44; Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589.

146. Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194 (1983).

147. *See supra* note 86 and accompanying text.

148. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986); FCC v. Pacifica Found., 438 U.S. 726 (1978) (plurality opinion).

149. *See* Osborne v. Ohio, 495 U.S. 103 (1990); New York v. Ferber, 458 U.S. 747 (1982).

The facts in *Young v. American Mini Theatres, Inc.*[152] presented an occasion for the Supreme Court to show and to consider the tension between a city's conflicting goals of preventing the concentration of theaters showing sexually explicit, nonobscene movies and protecting First Amendment rights of expression.[153] This tension became apparent in the case as a result of Detroit's adoption of a zoning ordinance requiring the geographic dispersement of "adult" movie theaters. Specifically, the ordinance provided that an adult theater could not be located within one thousand feet of any two other adult theaters or "regulated uses," which included ten additional kinds of establishments, or within five hundred feet of a residential area.[154] The ordinance classified a theater as "adult" based expressly upon the character of the films it showed.[155] Writing for the plurality, Justice Stevens first noted that whether speech is or is not protected by the First Amendment is entirely dependent on the content of the speech.[156] He also noted that even within the contours of protected speech, "a difference in content may require a different governmental response,"[157] as in the case of defamation, where a different result obtains depending on whether the defamatory content involves a public figure or a private figure.[158] Finally, Justice Stevens observed that distinctions based upon content exist in commercial speech and obscenity cases.[159]

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150. *See* City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (plurality opinion).

151. *See* Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978). Defamation and the speech of public employees also fit within the rubric of low value speech. *See* TRIBE, *supra* note 3, § 12-18, at 930 & nn.14-15.

152. 427 U.S. 50 (1976).

153. Young v. American Mini Theatres, Inc., 427 U.S. 50, 52 (1976). No claim was asserted that the ordinance reached only unprotected obscenity. *See id.* at 61-62.

154. *Id.*

155. *Id.* at 53.

156. *Id.* at 66 (discussing content as the key to drawing the line between permissible advocacy and impermissible incitation to crime, between nonfighting words and fighting words, and between permissible news stories and impermissible disclosures of confidential governmental information).

The plurality in *American Mini-Theatres* quibbled about how properly to characterize the Detroit zoning ordinance. Justice Stevens, joined by Justices Burger, White, and Rehnquist, expressly recognized that the ordinance in question was *not* content-neutral. *See id.* at 70-71. Justice Powell, who provided the fifth vote for the plurality in his concurring opinion, disagreed with this characterization, and concluded that the ordinance, in fact, was content-neutral. *See id.* at 78-79. Thus, without accepting Justice Stevens' view that the zoning ordinance was not content-neutral, Justice Powell agreed to the sliding-scale balancing approach. *See infra* note 163 and accompanying text. Justice Stewart, and three others, argued in dissent that the zoning ordinance was constitutionally impermissible because it was a content-based restriction. *See id.* at 84-86.

157. *Id.*

158. *Id.* at 66-67.

159. *Id.* at 68-69 (discussing cases affording commercial speech some protection and

Reasoning that lines drawn on the basis of content do not necessarily violate the government's "paramount obligation of neutrality in its regulation of protected communication,"[160] the plurality found two justifications for the ordinance's content-based distinctions. First, the effect of the ordinance on all films was the same; the ordinance did not approve or disapprove of films based upon their points of view.[161] Second, sexually-explicit but nonobscene expression "is of a wholly different, and lesser, magnitude" or value than other forms of speech, particularly "untrammeled political debate."[162] Against this backdrop, the plurality then balanced the slight First Amendment value of sexually-explicit, nonobscene speech against the city's interest in preserving the character of its neighborhoods, and concluded that the city's interest outweighed the value of such expression.[163]

The sliding-scale balancing approach of *American Mini Theatres* has not amounted to an "aberration," as hoped for by the dissenters.[164] Instead, it has become a distinct doctrinal approach, one that allows states and municipalities sufficient room and "reasonable opportunity to experiment with solutions to admittedly serious problems."[165] In the contexts in which it has been employed,[166] the First Amendment interests arguably have been relatively weak vis-a-vis the harms sought to be redressed by the governmental unit,[167] and application of traditional, absolutist

prohibiting the distribution and exhibition of nonobscene adult materials to juveniles, and concluding that the cases turned on the content of the communication under consideration).

160. *Id.* at 70.

161. *Id.*

162. *Id.*

163. *American Mini Theatres*, 427 U.S. at 71.

164. *See id.* at 87 (Stewart, J., dissenting).

165. *See id.* at 71.

166. *See supra* notes 148-51 and accompanying text.

167. *See, e.g.*, Osborne v Ohio, 495 U.S. 103, __, 110 S. Ct. 1691, 1696-97 (1990) (upholding state law proscribing the possession and viewing of child pornography after balancing First Amendment values and the state's governmental interest in safeguarding the health and safety of children); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48-55 (1986) (upholding city zoning ordinance restricting the location of "adult" movie theaters after balancing First Amendment values and the city's substantial governmental interests in preserving the quality of urban life and eliminating the "secondary effects" of adult theaters on the character of neighborhoods); New York v. Ferber, 458 U.S. 747, 756-64 (1982) (upholding state law proscribing the knowing distribution of child pornography after balancing First Amendment values and the state's governmental interest in preventing the sexual exploitation and abuse of children); Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557, 564 (1980) (a restriction on truthful commercial speech is permissible if it "directly advances the [substantial] governmental interest asserted . . . and is not more extensive than is necessary to serve that interest"); FCC v. Pacifica Found., 438 U.S. 726, 744- 50 (1978) (plurality opinion) (upholding the power of government to restrict the public broadcast of indecent language after balancing First Amendment values and the state's governmental interest in protecting unwilling listeners and the well-being of children).

rules (either it is or is not protected speech) would have stymied or even disabled the government in its problem-solving efforts.[168] In short, while the "low value" approach may be problematic in terms of line drawing and slippery slopes,[169] its virtue is the balancing of competing values that it permits.

Just as the Court has rethought commercial speech jurisprudence and identified commercial speech as an intermediate category of speech entitled to less than full constitutional protection,[170] hate speech, to the extent that it currently is thought to be fully protected, should be reconsidered and identified as an intermediate category of speech.[171] In identifying

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168. *See* Note, *supra* note 86, at 242 ("Although the two-tier approach works well when [F]irst [A]mendment interests are particularly weak or strong, it seems unsatisfactory when, as in the regulation of the *possession* of child pornography, the [F]irst [A]mendment interests enjoy some intermediate value."); *see also* Recent Cases, *First Amendment—Racist and Sexist Expression on Campus—Court Strikes Down University Limits on Hate Speech—Doe v. University of Michigan, 721 F. Supp. 852 (E.D. Mich. 1989)*, 103 HARV. L. REV. 1397, 1397, 1399 (1990) (two-tier analysis—"categorization analysis"—maximizes important First Amendment interests but undervalues conflicting norms and, very possibly, perpetuates problems sought to be redressed; indeed, "the analytical technique 'predetermine[s]' rulings against restrictions by defining a tight sphere of unprotected speech and ruling out consideration of competing interests") (footnote omitted).

169. *See* TRIBE, *supra* note 3, § 12-18, at 940-44 (critique of low value approach); Prygoski, *supra* note 145, at 319, 351-53 (same).

170. *Compare* Valentine v. Chrestensen, 316 U.S. 52 (1942) (commercial speech is outside the protection of the First Amendment) *with* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial speech is entitled to some First Amendment protection) *and* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978) (while commercial speech is entitled to a degree of constitutional protection, it has a "subordinate position in the scale of First Amendment values").

In *American Mini Theatres* the Court utilized a sliding-scale balancing approach even though the *plurality* could not agree on whether the zoning ordinance was or was not content-neutral. *See supra* note 156. In the commercial speech area, by way of contrast, the Court has not struggled with the characterization problem: The *majorities* in the commercial speech cases have agreed that the level of protection to be accorded a particular type of commercial speech is entirely dependent upon its content. *See, e.g.*, Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 457 (1978) (majority states that a lawyer's in-person solicitation of a client involves commercial speech that, because of its content, "lowers the level of appropriate judicial scrutiny"); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (majority states that "[i]f there is a kind of commercial speech that lacks all First Amendment protection, . . . it must be distinguished by its content."). The point is that the *majorities* in *Virginia State Bd. of Pharmacy* and *Ohralik* employed the sliding-scale balancing approach even though in both cases they conceded that the degree of scrutiny and the level of protection to be accorded the speech at issue was to be determined solely by the content of the speech. The commercial speech cases, therefore, provide a stronger argument for the sliding-scale balancing approach.

171. The idea here is that with the advent of the low value speech approach, reclassification of speech is a viable option under certain circumstances. In the case of commercial speech, the Court extended some First Amendment protection to speech that previously was without protection. In large part, the Court's reclassification was prompted by recognition that in a predominantly free market economy, the free flow of commercial information is indispensable to the informed consumer. *See Virginia State Bd. of Pharmacy*, 425 U.S. at 763-65. But there is no requirement that reclassification involve a "ratchet-up" in the degree of constitutional protection. To the contrary. Substantial governmental interests may call for restrictions on some forms of borderline speech so that other objectives may be achieved.

speech of low value, four factors have appeared in the Court's analysis: the proximity of the speech to central First Amendment concerns; the speaker's purpose and intent; the degree to which the speech has noncognitive aspects, to which the Constitution accords less protection; and the likelihood that the statute regulating the speech was passed for constitutionally infirm motivations or the likelihood that the statute will generate constitutionally worrisome evils.[172]

Taking into account these factors, abusive speech within the school environment surely constitutes "low value" speech. Discriminatory slurs aimed at students are not related to affairs of the public and do not further endeavors to ascertain truth, nor do they encourage open discussion of ideas and issues of import.[173] Hate speech thus does not enjoy a closeness to primary First Amendment concerns. Moreover, the speaker of epithets and slurs does not seek to communicate any message, but rather intends to inflict harm on a victim[174] who, because of age and past experiences, is particularly vulnerable. With respect to the third factor, hate speech intended to injure is overwhelmingly noncognitive; the speaker does not impart knowledge in any way. Whether the regulation of hate speech is based on constitutionally permissible reasons and legitimate motivations is a closer question, for opponents of regulation will assert the problem of content- or viewpoint-based discrimination.[175] The claim is insufficient to preclude classification of hate speech as "low value" expression, however. Justification for regulation is the elimination of a specific harm to students, and any incidental suppression of particular opinions or subject matters is tightly connected to the goal of eliminating specific harms. Regulation of "low value" speech, by definition, involves some modicum of control over expression that does not place "high" in the First Amendment hierarchy.[176] It is precisely for this reason that the Supreme Court has upheld narrowly-drafted provisions supported by substantial state interests, such as the reduction or elimination of some perceived harm.[177]

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172. *See* Sunstein, *supra* note 145, at 602-05.

173. *See supra* note 68.

174. *See supra* note 31 and accompanying text.

175. *See* Kingsly Int'l Pictures Corp. v. Regents, 360 U.S. 684, 688-89 (1959) (holding that the prohibition of the showing of a movie based on *Lady Chatterly's Lover* was unconstitutional because of its viewpoint discrimination); American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 328 (7th Cir. 1985) (holding that Indianapolis' anti-pornography statute impermissibly discriminated on the basis of viewpoint).

176. The conceptual notion of "low value" speech turns on "a judgment about its substantive message." GREENAWALT, *supra* note 8, at 299. This is undeniable.

177. *See, e.g.*, Posadas de Puerto Rico Assocs. v. Tourism Co., 478 U.S. 328, 340-46

Two decisions provide particularly strong support for regulations of hate speech aimed at protecting students. In *New York v. Ferber*[178] and *Osborne v. Ohio*[179] the Court reemphasized the critical importance of youth and their welfare and well-being. In upholding a narrowly-tailored prohibition on the distribution of nonobscene child pornography in *Ferber*, the Court held the state's interest in safeguarding the psychological health of minors to be compelling.[180] In *Osborne* the Court similarly chose to protect the psychological health of young adults, even though to do so required sustaining a limitation on the First Amendment interest in possessing nonobscene child pornography.[181] The prevention of psychological harm to students resulting from abusive speech is a compelling governmental interest under *Ferber* and *Osborne* and tips the balance in favor of the constitutionality of school hate speech regulations.[182]

(1986) (holding that the greater power to ban gambling altogether includes the lesser power to prohibit some, but not all, gambling casino advertising); FCC v. Pacifica Found., 438 U.S. 726, 744-50 (1978) (plurality opinion) (holding that the government may restrict the broadcast of indecent language). *See generally* Sunstein, *supra* note 145, at 609-17 (discussing problem of viewpoint discrimination in the context of low value speech and concluding that it does not necessarily defeat a regulation of low value speech).

178. 458 U.S. 747 (1982).

179. 495 U.S. 103 (1990).

180. *See* New York v. Ferber, 458 U.S. 747, 756-64 (1982). The Court stated that "[t]he legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the psychological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment." *Id.* at 758 (footnote omitted). In so stating, the Court observed that in the past it had sustained legislation aimed at protecting the physical and emotional well-being of minors, even though the restrictions at issue "operated in the sensitive area of constitutionally protected [First Amendment] rights." *Id.* at 757 (citing *Pacifica Found.*, 438 U.S. 726, Ginsburg v. New York, 390 U.S. 629 (1968), and Prince v. Massachusetts, 321 U.S. 158 (1944)). On this basis, the Court upheld what it acknowledged to be a "content-based classification of speech . . . because it may be appropriately generalized that within the confines of the given classification, the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." *Id.* at 763-64.

181. *See* Osborne v. Ohio, 495 U.S. 103, __, 110 S. Ct. 1691, 1696-97 (1990).

182. One commentator forcefully has stated this conclusion in analyzing the ramifications of *Osborne*:

> [I]t is difficult to distinguish the compelling interest in protecting children from the *psychological* harm caused by knowledge of future distribution of pornography from the interest in preventing racial prejudice or other types of emotional harm to children. For example, protecting children from the psychological harm inflicted by hate speech might now sustain a content-based restriction on the right of some groups to express their views when children might be exposed.

Note, *supra* note 86, at 242; *see also id.* at 246 (the low value approach may result in "judicial reclassification of other types of speech, such as vulgar or hate speech").

3) *A "Full Value" Speech Approach: Compelling State Interests*

In order for a discriminatory exclusion of speech to withstand constitutional scrutiny, its proponent must show that it furthers "a compelling state interest."[183] A third regulatory rationale holds that proscriptions on hate speech serve compelling governmental interests. *Ferber* and *Osborne*, cases fitting within the "low value," sliding-scale speech rubric,[184] established that the prevention of psychological harm to young people is a compelling state interest.[185] That determination has applicability within the "full value" analytic framework, under which content-based prohibitions must fall unless supported by a compelling justification. The injurious psychological impact of derogatory epithets and slurs on individuals, especially children and young adults, is well-documented and widely accepted.[186] Simply stated, the prevention of psychic injury to students is a compelling interest that outweighs any right of expression.

Another interest that may be characterized as compelling is a school's interest in complying with constitutional obligations imposed on it.[187] In accordance with the Fourteenth Amendment's guarantee of equal protection,[188] public colleges and universities are under constitutional mandate to provide equal educational opportunities for students.[189] Abusive speech in the school environment affects students in negative ways and inhibits their ability to learn, thereby depriving them of opportunities for full and rich learning experiences. Schools cannot fulfill goals of equality and equal opportunity when abusive speech prevents students from fully participating in the educational program.[190] Both the Stanford and the University of Wisconsin regulations are pre-

183. Widmar v. Vincent, 454 U.S. 263, 269-70 (1981); Consolidated Edison v. Public Serv. Comm'n, 447 U.S. 530, 540 (1980); *see also* TRIBE, *supra* note 3, § 12-8, at 833.

184. *See supra* notes 144-82 and accompanying text.

185. *See Osborne*, 495 U.S. at __, 110 S. Ct. at 1696; New York v. Ferber, 458 U.S. 747, 756-59 (1982).

186. *See supra* notes 28-57 and accompanying text.

187. *See Widmar*, 454 U.S. at 271.

188. U.S. CONST. amend. XIV.

189. *See* Brown v. Board of Educ., 347 U.S. 483, 493-95 (1954). In no uncertain terms, the Court in *Brown* stated that "[i]n these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, *is a right which must be made available to all on equal terms.*" *Id.* at 493 (emphasis added). For a discussion of the implications of *Brown* in the hate speech context, see Lawrence, *supra* note 9, at 438-49 (arguing that *Brown* is a case about equal educational opportunity and racist speech).

190. *See* Ronna G. Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 551 (1987); Shapiro, Note, *supra* note 9, at 228.

mised, in part, on the compelling governmental interest of providing equal access to education.[191]

The psychological injury of paramount concern to the Court in *Brown*[192] is the type of injury actionable under Title VII[193] of the Civil Rights Act of 1964[194] and Title IX of the Educational Amendments of 1972.[195] Title VII prohibits discrimination within the employment setting on the basis of race, sex, religion, or national origin;[196] Title IX prohibits discrimination on the basis of sex within educational institutions receiving federal funding.[197] Case law under Title VII allows a plaintiff to establish a violation by showing that discriminatory and harassing conduct created a hostile or abusive workplace.[198] The objective of Title VII is to provide employees with environments "free from discriminatory intimidation, ridicule, and insult."[199] The determination of whether a work environment is hostile includes consideration of "verbal conduct."[200] In some instances, therefore, equality interests can trump free speech interests.[201] *Brown*'s powerful analysis

191. *See* FUNDAMENTAL STANDARD INTERPRETATION, *supra* note 115, at § 2 (harassment on the basis of sex, race, color, handicap, religion, sexual orientation, or national and ethnic origin "contributes to a hostile environment that makes access to education for those subjected to it less than equal"); WISC. ADMIN. CODE, *supra* note 118, at § 17.06(2) (harassment on the basis of race, sex, religion, color, creed, disability, sexual orientation, national origin, ancestry, or age that demeans an individual and creates an "intimidating, hostile or demeaning environment" is prohibited); *see also* Hodulik, *supra* note 14, at 576-78 (discussing "familiar legal principles" that establish a university's "general duty to provide equal educational opportunities"). As discussed above, Stanford and the University of Wisconsin also premised their regulations on the fighting words doctrine. *See supra* notes 114-18 and accompanying text.

192. *See Brown*, 347 U.S. at 494.

193. *See* Brown, Note, *supra* note 11, at 326.

194. Pub. L. No. 88-352, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000(e) to 2000(e)-17 (1982 & Supp. V 1987)).

195. Pub. L. No. 92-318, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1686 (1988)).

196. 42 U.S.C. § 2000(e) (1982).

197. 20 U.S.C. § 1681(a) (1988).

198. *See* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65-67 (1986).

199. *Id.* at 65 (citation omitted).

200. *See id.*; EEOC Guidelines on Sex Discrimination, 29 C.F.R. § 1604.11(a)(3) (1988). Discriminatory epithets and slurs, thus, are cognizable under certain circumstances. However, the " 'mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee' would not affect the conditions of employment to [a] sufficiently significant degree to violate Title VII." *Meritor*, 477 U.S. at 67 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)).

201. In a related context, the Court has held that a state's "compelling interest in eradicating discrimination" justifies any impact that a state's anti-discrimination statute may have on First Amendment rights of freedom of expressive association. *See* Roberts v. United States Jaycees, 468 U.S. 609, 623 (1984); *see also* New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1 (1988); Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987). In *Roberts* the Court held that "even if enforcement of the [state anti-discrimination] Act causes some incidental abridgment of the . . . [civic group's] protected speech," by requiring it to admit women members, the incidental abridgment was permissible because of the "State's strong historical commitment to eliminating discrimination and assuring its citizens equal access" in public accommodations. *Roberts*,

of the psychological effects of harassment and discrimination mesh analytically with the hostile environment concept, making the eradication of hostile educational environments a compelling state interest.[202]

III. THE SPECIAL CASE OF THE PUBLIC SCHOOLS REQUIRES REGULATION OF HATE SPEECH

The "no value" speech approach (fighting words), the "low value" speech approach (variable protection), and the "full value" speech approach (compelling governmental interests),[203] all articulated within the discussion concerning constitutionally legitimate responses to abusive epithets and slurs at the college and university level,[204] are viable doctrinal approaches for regulating hate

468 U.S. at 624, 628. In reaching this conclusion, the Court focused on the stigmatization and the deprivations of personal dignity suffered by women when they are denied membership in organizations solely on account of their sex. *See id.* at 624-27. *Roberts* and Title VII's prohibition on hostile environments results from the explicit recognition of sensibility harms and stands for the proposition that equality values can outweigh free speech values. *See* Note, *supra* note 43, at 698-700; Recent Cases, *supra* note 168, at 1401 n.43.

202. *Cf.* Smith v. St. Tammany Parish Sch. Bd., 316 F. Supp. 1174, 1176-77 (E.D. La. 1970), *aff'd*, 448 F.2d 414 (5th Cir. 1971) (per curiam) (prohibiting under *Brown* the display of the Confederate flag in a high school). As one commentator has argued:

> Hostile environment analysis under Title VII and Title IX demonstrates that speakers are free to utter words and phrases of their choice, no matter how abhorrent to listeners, until those utterances go beyond mere verbalization and create a hostile environment. Universities should borrow this hostile environment concept to draft constitutional campus conduct codes.

Shapiro, Note, *supra* note 9, at 226; *see also* Recent Cases, *supra* note 168, at 1401 n.43. For a detailed discussion of the hostile environment concept, see Shapiro, Note, *supra* note 9, at 220-29.

Professor Strossen has objected that *Brown* does not provide a useful analogy, because that case involved government speech, not speech by private individuals. *See* Strossen, *supra* note 15, at 541-42, 544-47. Her state action doctrine objection is well-taken, but it probably does not disqualify the anti-discrimination message of *Brown* or the hostile environment analogy as bases for the regulation of hate speech, for no court has held Title VII to be an impermissible regulation of a private person's speech rights. *See* Lawrence, *supra* note 9, at 440 n.41. Moreover, Justice O'Connor has stated: "It is beyond dispute that any public entity, state or federal, has a compelling interest in assuring that public dollars, drawn from the tax contributions of all citizens, do not serve to finance the evil of private prejudice." J.A. Crosen Co., 109 S. Ct. 706, 720 (1989) (plurality opinion) (citation omitted).

203. *See supra* notes 88-202 and accompanying text.

204. Only two university regulations have been held unconstitutional. *See* UWM, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852, 866-67 (E.D. Mich. 1989). In *Doe* the court, on the grounds of overbreadth and vagueness, invalidated the University of Michigan's hate speech regulation, which made sanctionable speech that stigmatized or victimized students on the basis of enumerated traits, constituted a threat, interfered with their academic efforts or participation in school activities, and created an "intimidating, hostile, or demeaning environment." *See id.* at 856, 866-67. Similarly, the court in *UWM Post* invalidated the University of Wisconsin's hate speech regulation on the grounds of overbreadth and vagueness. *See UWM Post*, 774 F. Supp. at 1181. Thus, there are no guarantees that courts will determine hate speech regulations, whatever their regulatory rationale, to be constitutionally valid. On the other hand, however, by narrowly drafting regulations in accordance with clear First Amendment doctrine permitting limited control of speech, colleges and universities seek to

speech at the elementary and secondary levels as well.[205] Expression that is unprotected for adults certainly is unprotected for children in the public schools. Doctrinal approaches considered and utilized at the level of post-secondary education thus establish a beginning point for considering ways to deal with abusive speech in the public schools and for thinking about how the tension between the values of equality and free speech affects elementary and secondary students and the educational enterprise itself. Specific constitutional doctrine carved out by the Supreme Court to govern the operation of the public schools provides additional support for speech-limiting regulations designed not to ratify bald acts of administrative censorship, but rather to advance principles of equality in a way consistent with First Amendment principles. Furthermore, normative educational values of democratic educational theory applicable to elementary and secondary schools suggest that good educational policy requires the regulation of hate speech in the public schools.

A. NORMATIVE EDUCATIONAL VALUES OF DEMOCRATIC EDUCATIONAL THEORY MANDATE REGULATION OF HATE SPEECH

Public education, like society and post-secondary education except on a smaller scale, is a philosophical puzzle; it simultaneously reflects libertarian and communitarian ideals[206] and grapples with both visions in attempting to fulfill its mission, however defined.[207] Education is marked by a struggle for conceptual and

implement rules that are fully sustainable under the Constitution. *See, e.g.*, Grey, *supra* note 15, at 54 (The Stanford proposal "is consistent with First Amendment principles as the courts have developed them. However no court has ruled on the constitutionality of a harassment restriction based on the 'fighting words' concept, and no one can guarantee that this approach will prove acceptable. What in my view is virtually certain is that any broader approach . . . will be found by courts applying current case law to be invalid.").

205. *See supra* note 87 and accompanying text.

206. *See* Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 17-18, 94-95 ("[Public] [s]chools are asked simultaneously to respect and nurture both the communal and individual aspects of the human spirit."); Steven Shiffrin, *Government Speech*, 27 UCLA L. REV. 565, 647 (1980) ("Children are the Achilles heel of liberal ideology.").

207. Concisely stated, the public schools have four broad areas of goals that frame their educational function: "(1) academic, embracing all intellectual skills and domains of knowledge; (2) vocational, geared to developing readiness for productive work and economic responsibility; (3) social and civic, related to preparing for socialization into a complex society; and (4) personal, emphasizing the development of individual responsibility, talent, and free expression." GOODLAD, *supra* note 22, at 37; *see also id.* at 50-56. One commentator has stated the goals of education in even broader terms: "Education may aim to *perfect* human nature by developing its potentialities, to *deflect* it into serving socially useful purposes, or to *defeat* it by repressing those inclinations that are socially destructive." GUTMANN, *supra* note 25, at 22 (footnote omitted).

normative clarity of purpose:

> There is a profound confusion in America today about the school's role in shaping character. A corrosive individualism eats away at the heart of the enterprise. Teachers are doubtful about the grounds of their moral authority, parents organize themselves into special-interest groups, students are trained to become skillful consumers and clever advocates. We are uncertain how to give form to . . . our program for social survival . . . .[208]

The struggle is not one limited to consideration and debate by professional educators and concerned parents, at a level removed from the students themselves: oftentimes, students can "clearly articulate the tenuous balance between individual expression and collective responsibility."[209] Nonetheless, so long as First Amendment doctrine is thought to be derived from principles of liberalism and the belief in the self-sufficient and autonomous individual, value training and community concerns will conflict with free speech.[210] Notwithstanding this tension, however, educational authorities have concluded that the good school is one that has a rich sense of community,[211] that is, a "sharing of attitudes, values, and beliefs that bond disparate individuals into a community."[212]

Principled decision making intended to result in good schools—schools possessing a strong feeling of community and a positive ethos—presupposes a normative theory of education,[213]

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208. GRANT, *supra* note 12, at 1.

209. SARA LAWRENCE LIGHTFOOT, THE GOOD HIGH SCHOOL: PORTRAITS OF CHARACTER AND CULTURE 347 (1983).

210. *See* Ingber, *supra* note 206, at 18, 66.

211. *See, e.g.*, GRANT, *supra* note 12, at 1 (school is a community); *see also* LIGHTFOOT, *supra* note 209, at 346 ("[A]dministrators, teachers, and students combine to form a community [in countless ways]. Both adults and adolescents seem to need to feel a part of a larger network of relationships and want to feel identified with and protected by a caring institution.").

212. GRANT, *supra* note 12, at 117; *see also* LIGHTFOOT, *supra* note 209, at 321, 323, 346 (good schools offer protection and solace by "separat[ing] the school from the wider society, marking internal and external territories," and offering institutional values).

213. *See* GUTMANN, *supra* note 25, at 6. Professor Gutmann has argued that educational policy prescriptions cannot be evaluated without first thinking through and adopting a political theory about education:

> All significant policy prescriptions presuppose a theory, a political theory, of the proper role of government in education. When the theory remains implicit, we cannot adequately judge its principles or the policy prescriptions that flow from them. The attractions of avoiding theory are . . . superficial. We do not collectively know good educational policy when we see it; we cannot make good educational policy by avoiding political controversy; nor can we make principled educational policy without exposing our principles and investigating their implications.

ideally one that "avoid[s] both the extreme pessimism of many voices on the left and the brittle moral formulas often advanced by those on the right."[214] A useful theory fulfills two functions: it gives content to what society's educational objectives ought to be, and it specifies who is responsible for educational policy.[215] A democratic theory of education for the public schools satisfies both requirements, providing a basis for normative discourse on goals, in addition to establishing who has authority to make decisions and to shape education and schooling.[216]

The conceptual foundation of a democratic theory of education is democracy itself. Proponents believe that authority over elementary and secondary educational matters should be distributed among parents, professional educators, and the public, with the collective will of the majority controlling educational choices.[217] So long as there is no single conception of the good life,

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Id. Moreover, we can choose among and give content to the aims of schools "only by developing a normative theory of what the educational purposes of our society should be." *Id.* at 22; *see also* Lawrence Kohlberg & Rochelle Mayer, *Development as the Aim of Education*, 42 HARV. EDUC. REV. 449, 449 (1972) ("Without clear and rational educational goals, it becomes impossible to decide which educational programs achieve objectives of general import and which teach incidental facts and attitudes of dubious worth.").

214. GRANT, *supra* note 12, at 1. The literature on education is replete with doomsday assessments of American schooling. *See, e.g.*, JAMES SAMUEL COLEMAN, REPORT ON EQUALITY OF EDUCATIONAL OPPORTUNITY (U.S. Gov't Printing Office 1966) (education in schools makes little or no difference in the distribution of income, work, and intelligence among students, and does not assist students in overcoming disadvantages arising from their family backgrounds). Professor Lightfoot has responded as follows:

> The combined impact of the subtle negativisms of social science investigations and the flagrant attacks of muckrakers over the last few decades has produced a cultural attitude towards schools which assumes their inadequacies and denies evidence of goodness. This pessimism and cynicism has had a peculiarly American cast. The persistent complaints seem to reflect a powerful combination of romanticism, nostalgia, and feelings of loss for a simpler time when values were clear; when children were well behaved; when family and schools agreed on educational values and priorities; when the themes of honor, respect, and loyalty directed human interaction. In comparison to this idealized retrospective view, the contemporary realities of school seem nothing short of catastrophic.

LIGHTFOOT, *supra* note 209, at 314 (footnote omitted). The overtly negative appraisals of schools also may result from the high standards of evaluation employed. *Id.* at 309. The establishment of good schools will be nearly impossible if the standard is perfection or something close to perfection. *Id.*

215. *See* GUTMANN, *supra* note 25, at 6-7, 11, 16, 22.

216. *See id.* at 6-9, 41-47.

217. *See* ANN BASTIAN ET AL., CHOOSING EQUALITY: THE CASE FOR DEMOCRATIC SCHOOLING 5-6, 92-133 (1986) ("democratic concepts of schooling should govern," with the "empowerment" of parents, teachers, and communities an absolute necessity); GRANT, *supra* note 12, at 4 (a successful educational venture requires "a dialogue with all members of the polity—students, parents, teachers, and staff"; the public school "must be in dialogue with its public about the nature of both the moral and the intellectual life of the school"); GUTMANN, *supra* note 25, at 11, 42 (parents, professional educators, and citizens must be "empowered" to make educational policy). For purposes of discussion, this article focuses on the democratic educational theory outlined by Professor Gutmann. See GUTMANN, *supra* note 25. Unlike many educational philosophies or idealogies, her theory is

there can be no single ideal of moral education.[218] Disagreements over the aims of education and the appropriate solutions to particular educational issues are inevitable in a pluralistic society.[219] Thus, democratic deliberation on educational problems and on school management as a means to achieving public reconciliation of differences, according to Professor Gutmann, is the distinctive virtue of a democratic theory of education.[220] The deliberative process will not result in the selection of the right courses of action or the wisest choices all of the time, but it will produce educational policy informed by the values and concerns of the community.[221]

Drawing upon the theoretical strengths of the normative educational philosophies advanced by three political thinkers, Professor Gutmann's theory of democratic education has multiple rationales. A democratic theory of education holds that virtue should be taught to students, but not based upon the conception of the Platonic family state, pursuant to which the state, as the sole entity vested with control over educational matters, forces the cultivation of unity by teaching what it alone has defined to be the moral ideal or the singular conception of the good life.[222] The the-

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nonfoundationalist in that it is not tied to any conceptions about human nature or its development. *See id.* at 21-22. For general discussions of educational ideologies linked to particular assumptions about psychological development, see JOHN M. RICH & JOSEPH L. DEVITIS, THEORIES OF MORAL DEVELOPMENT (1985); Kohlberg & Mayer, *supra* note 213, at 451-59.

218. *See* GUTMANN, *supra* note 25, at 11-12.

219. Individuals have their own ideas and standards regarding child-rearing and the development of effective schools, standards not amenable to simple translation into public policy. According to Professor Gutmann, "[t]here is no way to achieve social agreement on a moral ideal of education, at least in our lifetimes." *Id.* at 12.

220. *See id.* at 11-12. For some theorists, in contrast, democratic deliberation and control over education is the root cause of the serious problems in many school systems and the cause of infringement of individual rights and liberties. *See, e.g.*, STEPHEN ARONS, COMPELLING BELIEF: THE CULTURE OF AMERICAN SCHOOLING (1983) (arguing that majority control of the public schools is incompatible with First Amendment liberties, stifles the views of dissenting families, and manipulates political consciousness); JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS, AND AMERICA'S SCHOOLS (1990) (arguing that direct democratic control over schools is the cause of the public schools' failure adequately to perform and to meet the nation's educational needs); Stephen Arons & Charles Lawrence III, *The Manipulation of Consciousness: A First Amendment Critique of Schooling*, 15 HARV. C.R.-C.L. L. REV. 309 (1980) (arguing that majoritarian control of the public schools undercuts the most basic freedoms of a democratic system); Nadine Strossen, Book Review, 19 J. LAW & EDUC. 147 (1990) (reviewing AMY GUTMANN, DEMOCRATIC EDUCATION (1987)) (arguing that majoritarian decision making undervalues concerns for individual freedom).

221. *See* GUTMANN, *supra* note 25, at 11, 72, 99. *But see* Senhauser, Note, *supra* note 61, at 967 n.161 (questioning the assumption that school boards are representative of community values because of typically low voter turnout at school board elections, the disproportionate influence of affluent voters, and the lack of knowledge about educational concerns characteristic of most members of the community).

222. *See* GUTMANN, *supra* note 25, at 22-28, 46. The Supreme Court has repudiated the Platonic vision of education. *See* Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511-12 (1968); Meyer v. Nebraska, 262 U.S. 390, 401-02 (1923).

ory of the family state is theoretically weak because it attempts to preempt the myriad conceptions of the good life, that is, choices among ways of life, held by parents and citizens.[223] On the other hand, the Lockean theory of the state of families, under which educational authority rests exclusively in parents,[224] while recognizing the values of pluralism and of parental freedom to pass on their own values and ways of life to their children, ignores the reality that parents alone cannot be relied upon to teach their children the skills essential to rational deliberation, nor can they be relied upon to teach their children mutual respect.[225] In addition to authorizing the teaching of virtue, democratic educational theory thus holds that parental involvement is an essential element in the formation of educational policy, but that parents cannot have complete control.[226] Finally, democratic educational theory rejects the theory of the state of individuals, which is derived from the work of John Stuart Mill, pursuant to which the ideal educational authority maximizes the future choices of children without predisposing them towards any particular conception of the good life.[227] Under the theory of the state of individuals, schools are to provide opportunity of choice among conceptions of the good life and, at the same time, are to remain neutral regarding the varying conceptions of the good life. The objection of democratic educational theory is that neutrality is a mistaken ideal, one that is unattainable, and that children's choices must be limited to some degree because some choices, religious intolerance and bigotry, for example, are wrong.[228]

The cultivation of character, under democratic educational theory, is both legitimate and inevitable.[229] By acknowledging and allowing the cultivation of character, and by purposefully constraining choices to predispose children towards certain values, however, democratic educational theory shares a weakness present in the theories of the family state and the state of families.[230] The weakness is the potential for "imposition of a noncritical consciousness on children,"[231] that is, teaching children to accept cer-

223. *See* GUTMANN, *supra* note 25, at 28.
224. *See id.* at 28-33.
225. *See id.* at 29-33.
226. *See id.* at 46.
227. *See id.* at 33-35; *see also* Ingber, *supra* note 206, at 25-30.
228. *See* GUTMANN, *supra* note 25, at 35-41, 46.
229. *See id.* at 41, 51-52.
230. *See id.* at 43-44.
231. *Id.* at 44. Once inside the classroom, democratic majorities or their representatives face strong temptations to control what is taught. *See id.* at 72.

tain beliefs or a particular conception of the good life suggested to them in an unthinking, nondeliberative way.[232] To ensure that children develop the capacity to consider and to evaluate competing choices and competing formulations of the good life, democratic educational theory has two important limits on parental and political (democratic) control of education.[233] These limitations serve to restrict the majoritarian decision making process.[234]

The first limiting principle is that of "nonrepression," which "prevents the state, and any group within it, from using education to restrict rational deliberation of competing conceptions of the good life and the good society."[235] Education cannot be utilized to restrict children's consideration of other ways of life or the "just" society. The second limiting principle is that of "nondiscrimination," which provides that all educable children must be educated.[236] These limiting principles permit parents and other groups to shape children's choices; at the same time, however, they prevent any single group from monopolizing collective decision making.[237]

The principles of nonrepression and nondiscrimination constitute a normative call to cultivate in students the foundational values and principles of democratic society.[238] The public schools should teach children concern for civic virtue and mutual respect for all people,[239] regardless of religion, race, sex, or sexual prefer-

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232. *See id.* at 44. Noncritical consciousness would allow children to accept, without evaluation, sexist values, for example. *See id.* According to Professor Gutmann, such a result would be undemocratic because of the failure "to secure any space for educating children to deliberate critically among a range of good lives and good societies." *Id.*

233. *See* GUTMANN, *supra* note 25, at 44.

234. The theoretical danger of all overbearing majorities is their undervaluation of concerns for the rules of justice and the rights of the minority party. *See* THE FEDERALIST No. 10, at 77 (James Madison) (Clinton Rossiter ed., 1961).

235. GUTMANN, *supra* note 25, at 44.

236. *See id.* at 45. The second principle is one of nonexclusion: "No educable child may be excluded from an education adequate to participating in the political processes that structure choice among good lives." *Id.*

237. *See id.* at 46.

238. *See id.* at 19, 72; ROBERT D. HESLEP, EDUCATION IN DEMOCRACY: EDUCATION'S MORAL ROLE IN THE DEMOCRATIC STATE 4 (1989) ("Even though the United States has some features commonly thought to be undemocratic, it has many important ones—such as its ideals of liberty, equality, and representative government—that constitute it by and large as a democratic state, albeit an imperfect one."). Several commentators, however, have argued that whether foundational values and principles can be articulated at all is an open question. *See, e.g.*, Robert D. Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104, 1134 (1979) (there are no "uniformly acceptable" political values); Tyll van Geel, *The Search for Constitutional Limits on Governmental Authority to Inculcate Youth*, 62 TEX. L. REV. 197, 204 n.24 (1983) ("Whether or not there is such a thing as 'common values,' or 'basic values,' or an American creed is a hypothesis that has yet to be clearly confirmed.").

239. *See* GUTMANN, *supra* note 25, at 33, 42, 44, 72.

ence.[240] As a prescriptive matter, democratic educational theory views social diversity as desirable because of the enrichment it provides in terms of expanding perceptions and understandings of differing ways of life and differing points of view.[241] For these reasons, when "children come to school believing that 'blacks, Jews, Catholics, and/or homosexuals are inferior beings who shouldn't have the same rights as the rest of us,' . . . *it is criticism, not just clarification, of children's values that is needed.*"[242] The normative values of democratic educational theory, therefore, mandate strong criticism of racist, sexist, and homophobic speech, as well as speech reflecting intolerant attitudes towards religious and ethnic groups. Proscriptions on the usage of abusive language make clear the school's disavowal of the value judgments behind such utterances and further the principles of nonrepression and nondiscrimination by ensuring respect for the dignity of individual students.[243]

B. SPECIFIC CONSTITUTIONAL DOCTRINE GOVERNING THE PUBLIC SCHOOLS PERMITS THE REGULATION OF HATE SPEECH

1) *The Supreme Court, Democratic Education, and Value Inculcation*

The present structure of control over public education is marked by the dispersal of authority among parents, professional educators, and the public.[244] A central feature of the public school

240. *See id.* at 29-30, 40, 44, 56, 72, 122, 287.

241. *See id.* at 33.

242. *Id.* at 56 (emphasis added).

243. To fail to proscribe abusive epithets and slurs within the public schools in some way is to indicate agreement with them: "[A]dults [within the school community] epitomize some version of character to pupils—by ignoring or responding to incidents of racism in the classroom and hallway, . . . by the agreements they make about what behavior will not be tolerated as well as what actions will be honored." GRANT, *supra* note 12, at 1; *accord* Rosemary C. Salomone, *From Widmar to Mergens: The Winding Road of First Amendment Analysis*, 18 HASTINGS CONST. L.Q. 295, 319 (1991) ("Any form of expression exercised by anyone within the public schools runs the risk of appearing to be endorsed by government officials."). *But see* Board of Education v. Mergens, 110 S. Ct. 2356, 2372 (1990) (plurality opinion) ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.").

244. *See* ARONS, *supra* note 220, at viii ("a large part of the child-rearing function is handed over to a politically controlled, majority-oriented, and bureaucratically organized system of schools"); David A. Diamond, *The First Amendment and Public Schools: The Case Against Judicial Intervention*, 59 TEX. L. REV. 477, 506 (1981) ("The structure of education in the United States is predominantly local."); *see also* Shiffrin, *supra* note 206, at 653 ("[A] system which fragments decisionmaking about educational control is more likely to further children's rights. Granting absolute authority over what a second grader will learn to one parent, one school board, or one teacher is both unnecessary and undesirable.").

system, thus, in fact, is democratic control of education, the very hallmark of democratic educational theory. By and large, the Supreme Court has recognized and endorsed democratic educational theory in establishing the parameters of First Amendment doctrine for the public schools.[245] The Court has been reluctant to interfere with the local resolution of educational disputes,[246] and instead "has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools."[247]

The comprehensive authority of state legislatures and local school boards is premised on the proposition that the popular election of representatives results in the translation of parental and community values into educational policy.[248] In ceding authority over the public schools to parents, professional educators, and citizens via the political process, the Court has acknowledged and accepted value inculcation as an inevitable and wholly legitimate function of the public schools.[249] *Bethel School District No. 403 v.*

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245. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988) ("[O]ur oft-expressed view [is] that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges") (citations omitted); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("The determination of what manner of speech in the classroom or in school assembly is inappropriate rests with the school board."); Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 860-65 (1982) (states and local school boards have broad authority to manage school affairs and must discharge "highly discretionary functions"); Wood v. Strickland, 420 U.S. 308, 326 (1975) ("The system of public education that has evolved in this Nation relies necessarily upon the discretion and judgment of school administrators and school board members . . . ."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 49 (1973) (recognizing "the merit of local [school] control"); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (school boards have "important, delicate, and highly discretionary functions"); Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (states have substantial power over education, including the power to compel school attendance, make reasonable regulations governing the operation of schools, and establish curriculum requirements).

246. *See* Richard L. Berkman, *Students in Court: Free Speech and the Functions of Schooling in America*, 40 HARV. EDUC. REV. 567, 568 (1970) ("Judicial diffidence towards local school matters reflects the traditional American belief that education is a local concern which should be shaped and supervised by local officials."); Robert B. Keiter, *Judicial Review of Student First Amendment Claims: Assessing the Legitimacy-Competency Debate*, 50 MO. L. REV. 25, 26 (1985) ("The Court has consistently expressed the view that state and local officials are primarily responsible for educational matters, and that courts generally should defer to their decisions.") (footnote omitted); Senhauser, Note, *supra* note 61, at 967 n.161 ("Traditionally, the Court has been hesitant to intervene in educational disputes because it viewed the educational process as a local matter.").

247. Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 507 (1969).

248. *See* Diamond, *supra* note 244, at 494 n.86.

249. *See, e.g.*, Plyler v. Doe, 457 U.S. 202, 221 (1982) (the public schools are " 'a most vital civic institution for the preservation of a democratic system of government' " and serve "as the primary vehicle for transmitting 'the values on which our society rests' ") (citations omitted); Ambach v. Norwick, 441 U.S. 68, 76-80 (1979) (the public schools prepare young people for citizen participation in the future and preserve cultural values); *Pico*, 457 U.S. at 864-65 (the public schools are vitally important as vehicles for inculcating fundamental values necessary to a democratic political system); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (the public schools must teach subjects "plainly essential to good citizenship"); *Meyer*, 262 U.S. at 401 ("[T]he state may do much, go very far, indeed, in

Fraser and *Hazelwood School District v. Kuhlmeier*, the Court's most recent pronouncements on the First Amendment constraints on the public schools, expressed the Court's view that teaching students about community values and the principles of our society is vital to their social and moral development and to the maintenance of our political system.[250]

The Court's acceptance of value inculcation and programs of moral education in the public schools, however, is not unconditional or without limits. Democratic control of schools that choose to ride roughshod over basic, individual rights and freedoms of students would be an incongruence intolerable under the Constitution. The Court, therefore, proscribes narrow religious, political, and moral indoctrination,[251] and attempts to foster homogeneity in the schools.[252] While value inculcation is permissible, indoctrination is not;[253] judicial intervention is necessary in the case of the latter, on the ground that certain constitutional norms are too fundamental to leave to the judgment of parents and the local school board.[254]

The line between permissible value inculcation and impermissible indoctrination may not be as sharp as we would prefer. Nevertheless, encouraging students to embrace certain moral norms and ideals based upon principles essential to civilized society clearly falls on the side of constitutionally permissible value incul-

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order to improve the quality of its citizens, physically, mentally and morally . . . ."). Central to *Brown* was the Court's understanding that education is the primary vehicle for exposing students to cultural values. *See* Brown v. Board of Educ., 347 U.S. 483, 493 (1954).

250. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988); *Kuhlmeier*, 484 U.S. at 276 (Brennan, J., dissenting); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681-84 (1986). "*Fraser* was the first recent education law decision to explicate and uphold a school board's values mission. The fact that the decision reflected a near-unanimous agreement of the Court's liberal and conservative wings—and that its value inculcating themes were reiterated in the recent *Hazelwood* decision—adds to its significance." PUBLIC VALUES, PRIVATE SCHOOLS 45 (Neal E. Devins ed., 1989) (footnotes omitted). These two decisions indicate that at least a majority of the present Court is comfortable with the inculcative function of public education. For discussions of the public schools and the transmission of society's collective values, see Diamond, *supra* note 244, at 496-510; Brian A. Freeman, *The Supreme Court and First Amendment Rights of Students in the Public School Classroom: A Proposed Model of Analysis*, 12 HASTINGS CONST. L.Q. 1, 4-20 (1984); Ingber, *supra* note 206, at 20-30; Keiter, *supra* note 246, at 48-55; Levin, *supra* note 60, at 1647-61; Senhauser, Note, *supra* note 61, at 943-45, 959-77. For the view that the inculcative model is inappropriate and inconsistent with the personal autonomy of students, see van Geel, *supra* note 238, at 252-53.

251. *See, e.g.*, *Pico*, 457 U.S. at 864-72; *Tinker*, 393 U.S. at 507-14; Epperson v. Arkansas, 393 U.S. 97, 106-09 (1968); School Dist. v. Schempp, 374 U.S. 203, 225-26 (1963); Engel v. Vitale, 370 U.S. 421, 430, 436 (1962); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640-42 (1943); *Pierce*, 268 U.S. at 534-35; *Meyer*, 262 U.S. at 402.

252. *See Tinker*, 393 U.S. at 511; *Meyer*, 262 U.S. at 402.

253. *See generally* Freeman, *supra* note 250, at 50-57; Keiter, *supra* note 246, at 55-60.

254. *See* Keiter, *supra* note 246, at 58. In effect, judicial intervention interrupts the majoritarian political process. *See id.*

cation.[255] Teaching the constitutional values of equality and freedom from discrimination, along with the derivative value of mutual respect for all people, fosters pluralism and is far removed from the narrow political, religious, and moral indoctrination that the Supreme Court has repudiated.

2) *Public School Students and the First Amendment: Tinker, Fraser, and Kuhlmeier*

Children and teenagers—precollege students—have constitutional rights.[256] In general, however, their rights never have been held by the Supreme Court to be coextensive with the constitutional rights of adults.[257] The Court has justified limitations based upon the unique situation of children vis-a-vis their parents and the state and a recognition of the developmental characteristics of children. The Court has articulated three specific reasons supporting differential constitutional treatment of children: "the peculiar vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[258] These same concerns have allowed the Court to conclude that the First Amendment rights of children are not as broad as those enjoyed by adults, and that states may limit the free speech rights of children to a greater extent than they permissibly may limit the free speech rights of adults.[259]

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255. *See supra* notes 249-50 and accompanying text. Teaching students about appropriate moral standards can be saved from indoctrination largely by the manner in which it takes place. *See* GRANT, *supra* note 12, at 192-93; Freeman, *supra* note 250, at 55. "If adults teach . . . [moral standards and ideals] in an authoritarian manner as a fixed and unvarying code that must be stamped into the consciousness of children, then they can be charged with indoctrination." GRANT, *supra* note 12, at 193. As the Supreme Court has stated: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Barnette*, 319 U.S. at 642; *cf.* Wooley v. Maynard, 430 U.S. 705 (1977). On the other hand, if teachers offer arguments and reasons for the standards and ideals to persuade students to accept and to uphold them, they cannot be charged with indoctrination. *See* BERNARD MURCHLAND, VOICES IN AMERICAN EDUCATION 31-32 (1990) (reporting comments of Derek Bok on schools and indoctrination); GRANT, *supra* note 12, at 193.

256. *See, e.g., Tinker*, 393 U.S. at 514; *In re* Gault, 387 U.S. 1, 27-31 (1966).

257. *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985); Bellotti v. Baird, 443 U.S. 622 (1979) (plurality opinion); McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

258. *Bellotti*, 443 U.S. at 634. In the Court's view, states may limit the freedom of children to make decisions because "during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *Id.* at 635 (footnote omitted). In other words, as a result of children's incapacity for fully rational deliberation, their personal autonomy is not critical. *See* Ingber, *supra* note 206, at 18.

259. *See, e.g., Hazelwood*, 484 U.S. at 266-67; *Fraser*, 478 U.S. at 682-83; *Pacifica*, 438 U.S. at 749-51; Ginsberg v. New York, 390 U.S. 629, 636-37, 639-40 (1968); Prince v. Massachusetts, 321 U.S. 158, 168-71 (1944). For discussions of the relationships between children, the First Amendment, and the purposes of the First Amendment, see Diamond, *supra* note 244, at 487-96; Freeman, *supra* note 250, at 24-31; John H. Garvey, *Children*

The Court's rulings in a series of cases exemplify its solicitude for children and their less developed capacity to make decisions. In *Prince v. Massachusetts*[260] the Court upheld the conviction of a mother who allowed her young sons and her nine-year-old niece to sell religious materials on city sidewalks in contravention of Massachusetts' comprehensive child labor law.[261] The Court held, over the parents' objections based upon the Free Exercise Clause and the general rights of parenthood, that the state possessed an overriding, primary interest in safeguarding the welfare of children, which interest was broad enough to encompass a concern for both children's psychological health and their physical well-being.[262]

In *Ginsberg v. New York*[263] the Court similarly acknowledged the incapacity of children to engage in rational decision making. In weighing the well-established authority of parents to raise their own children[264] and the interest of the state in protecting children,[265] the Court noted that "even where there is an invasion of protected freedoms 'the power of the state to control the conduct of children reaches beyond the scope of its authority over adults.' "[266] On this basis, the Court upheld New York's criminal obscenity statute prohibiting the sale to children under the age of seventeen of materials deemed to be obscene to children but not necessarily to adults.[267]

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and the First Amendment, 57 TEX. L. REV. 321, 333-51 (1979); Keiter, *supra* note 246, at 31-44.

260. 321 U.S. 158 (1944).

261. Prince v. Massachusetts, 321 U.S. 158, 159-62, 170 (1944). In so holding, the Court stated in no uncertain terms that "[t]he state's authority over children's activities is broader than over like actions of adults." *Id.* at 168.

262. *See id.* at 169-70. According to one commentator, *Prince* "is a clear recognition of the principle that parental rights and First Amendment freedoms must sometimes give way to a regulation of the conduct of children, even though the regulation imposes incidental burdens on personal liberties." Freeman, *supra* note 250, at 25-26.

263. 390 U.S. 629 (1968).

264. *See* Ginsberg v. New York, 390 U.S. 629, 639 (1968).

265. *See id.* at 640.

266. *Id.* at 638 (quoting Prince v. Massachusetts, 321 U.S. 158, 170 (1944)). The Court noted:

> The world of children is not strictly part of the adult realm of free expression. The factor of immaturity, and perhaps other considerations, impose different rules. Without attempting here to formulate the principles relevant to freedom of expression for children, it suffices to say that regulations of communication addressed to them need not conform to the requirements of the [F]irst [A]mendment in the same way as those applicable to adults.

Id. at 638 n.6 (quoting Thomas J. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 938-39 (1963)).

267. *See id.* at 639, 643. In his concurring opinion, Justice Stewart added the following insight:

> I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First

The third case in this series is *FCC v. Pacifica Foundation*,[268] in which the Court held that the Federal Communications Commission has the power to proscribe the radio broadcast during daytime hours of material that is indecent but not obscene.[269] The Court's concern, once again, was the government's preeminent interest in protecting children.[270] Focusing on context, the Court found that the daytime broadcast of indecent material likely to be heard by children was " 'a right thing in the wrong place.' "[271]

Prince, *Ginsberg*, and *Pacifica* stand for the proposition that children may be protected by the state even though the state's protection would be inappropriate and unconstitutional were the state to extend it to an adult. At the nub of the Court's analysis is an assessment of children, their abilities, and their capacities to be rational actors. This class-based assessment[272] is that children are different from adults.[273] Thus, their age and maturity are relevant factors in determining the scope of their rights.

Significantly, to accept that limitations on the rights of children, even the First Amendment rights of children, sometimes are appropriate does not require acceptance of the notion that children are mere subordinates of adults, to be shaped by currently prevailing conceptions of human virtue. Nor should it. The idea here, to borrow a family law concept, is that the best interests of children[274] now and then require the imposition of legal restrictions on their freedom to choose. Limitations on their First Amendment rights, as *Prince*, *Ginsberg*, and *Pacifica* advise, are to

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> Amendment guarantees. It is only upon such a premise, I should suppose, that a State may deprive children of other rights—the right to marry, for example, or the right to vote—deprivations that would be constitutionally intolerable for adults.

Id. at 649-50 (Stewart, J., concurring) (footnotes omitted).

268. 438 U.S. 726 (1978).

269. FCC v. Pacifica Found., 438 U.S. 726, 748-51 (1978).

270. *See id.* at 749.

271. *Id.* at 750 (quoting Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926)); *see also id.* at 747 & n.25.

272. Assessments for purposes of allocating rights and responsibilities are of two kinds: class-wide, without evaluation of personal capabilities, and individual, with evaluation of personal capabilities. *See* Diamond, *supra* note 244, at 492. When the rights of children are at stake, assessments frequently are class-wide in nature. *See id.* For example, states are free to prohibit "minors," a group of children defined to be under a specified age, from driving, voting, and marrying. *See id.*; Ginsberg v. New York, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring).

273. Children are different in terms of vulnerability and competency, as well as in terms of parental control. *See supra* note 258 and accompanying text; *see also* Freeman, *supra* note 250, at 30 ("Minors often lack full capacity to make choices in an intelligent, rational, and independent manner.") (footnote omitted).

274. In family law, child custody determinations must be made pursuant to the best interests of the child. *See, e.g.*, MINN. STAT. ANN. § 518.17 (West 1990).

advance individual growth, autonomy, and self-actualization.[275] The goal of the public schools, therefore, is not to create "enclaves of totalitarianism"[276] or to foster homogeneous students,[277] but to provide pre-college students with environments conducive to learning and personal development. Limitations on pre-college students' First Amendment rights to further this objective by fostering pluralism and establishing equality pose no constitutional objection.[278]

The above trilogy of cases establishes the basic proposition that the state may limit the First Amendment rights of children in order to protect them. Viewed in the context of hate speech in the public schools, *Prince*, *Ginsberg*, and *Pacifica* strongly support the conclusion that hate speech may be regulated because of its detrimental effect on students and school atmosphere.[279] *Tinker* (the seminal case on the First Amendment rights of public school students), *Fraser*, and *Kuhlmeier* confirm this conclusion based upon varying doctrinal approaches, each analytically distinct, but all recognizing and approving the inculcative function of the public schools and providing them with the requisite authority to proscribe hate speech.

In the realm of First Amendment jurisprudence and the public schools, *Tinker* is a milestone, for it embodies the Court's unequivocal view that pre-college students possess free speech rights within the school environment.[280] In *Tinker* the Court considered the First Amendment rights of three junior high and senior high school students who wore black armbands to school to protest the Vietnam War and who were suspended by school officials for refusing to remove them.[281] The Court held that the school offi-

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275. *See* Keiter, *supra* note 246, at 43.

276. Tinker v. Des Moines Sch. Dist., 393 U.S. 503, 511 (1969) ("In our system, state-operated schools may not be enclaves of totalitarianism.").

277. *See id.*

278. In one commentator's opinion, *Ginsberg* alone "provides strong support for the proposition that the public school can . . . limit the access of children to ideas, beliefs, and materials that are considered deleterious to our youth." Freeman, *supra* note 250, at 31.

279. *See supra* notes 260-71 and accompanying text.

280. *See Tinker*, 393 U.S. at 506 ("It can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."); Keiter, *supra* note 246, at 39 (*Tinker* "represents the Court's strongest endorsement of [F]irst [A]mendment rights for children.").

281. *See Tinker*, 393 U.S. at 504. In the well-known facts of *Tinker*, three public school students, ages thirteen to sixteen, were suspended from school for wearing black armbands during school hours to publicize their objections to the Vietnam conflict. *Id.* School officials suspended them pursuant to a school policy providing that any student wearing an armband in school would be asked to remove it and, in the event of a refusal, would be suspended from school until such time as he or she returned to school without the armband. *Id.* The school adopted the policy after learning that the three students planned to wear

cials impermissibly exceeded the constitutional limits of their comprehensive educational authority because "there . . . [was] no evidence whatever of . . . [the students'] interference, actual or nascent, with the schools' work or of a collision with the rights of other students to be secure and to be let alone."[282] In reaching this conclusion, and in simultaneously establishing it as the test for ascertaining the degree to which student expression in school must be tolerated, the Court explicitly acknowledged the singular role of the public schools[283] and the paradox created when the First Amendment rights of public school students interfere with the need of schools to maintain order and a certain pedagogical atmosphere.[284] Thus, while *Tinker* extended constitutional protections to elementary and secondary school students,[285] its standard plainly provides less free speech protection for students in the school than is afforded adults.[286]

The Court's discussion in *Tinker* focuses on speech as necessary for citizen participation and the open debate of ideas and views.[287] The Court's emphasis is on communication of political

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armbands as an act of protest and just days before the three students actually wore them to school. *Id.*

282. *Id.* at 508; *see also id.* at 514 (The students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.").

283. *See id.* at 506 (noting the "special characteristics of the school environment").

284. *See id.* at 507 (recognizing the need for delegating comprehensive authority to the states and school officials to operate the schools and recognizing that problems occur "in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities"). The enigma, of course, is that the educational objective of teaching children about the virtues of democratic values would seem to preclude restrictions on their free speech rights.

285. In an oft-cited passage, the Court explained in dictum that students are not the mere pawns of school administrators and teachers:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Tinker, 393 U.S. at 511.

286. *See* Levin, *supra* note 60, at 1662 ("The *Tinker* standard clearly provides less protection for free expression in the special environment of the schools than is available to the ordinary citizen."). Under the *Tinker* standard, the school's authority to regulate expression is dependent on the reactions of other students, reactions which are gauged in terms of the disruption of school activities or the intrusiveness into students' lives, thereby giving effect to the heckler's veto, a result generally not countenanced in First Amendment jurisprudence governing adults. *See id.*

287. *See Tinker*, 393 U.S. at 508, 510-12, 514 (discussing political viewpoints and future leaders "trained through wide exposure to that robust exchange of ideas . . . .") (citation omitted).

viewpoints and personal intercommunication among students as a vehicle of personal growth.[288] Precisely because the speech at issue was of a "pure" political variety, however, the Court was not presented with concerns for the psychological and physical health of children as it previously had been in *Prince* and *Ginsberg*.[289] *Tinker*, therefore, does not detract from the central message of *Prince*, *Ginsberg*, and *Pacifica* that the state's interest in protecting children is of utmost importance and that limitations on children's First Amendment freedoms are necessary at times to further that interest.[290]

The *Tinker* standard itself belies any such conclusion. Under the test set forth in *Tinker*, student speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . not immunized by the constitutional guarantee of freedom of speech."[291] When student speech materially disrupts school activities or involves substantial disorder, the school's need to maintain order, to establish a positive learning environment, and to protect children takes precedence over students' rights of expression. Similarly, when student speech invades the rights of others, that is, hinders the ability of others "to be secure and to be let alone,"[292] the school's interests in protecting students from physical and psychological harm outweighs students' rights of expression.[293] Under *Tinker*, therefore, speech—even political

288. *See generally* Garvey, *supra* note 259, at 338-39 (arguing that in *Tinker* the Court envisioned students' free speech rights to be instrumental in nature, that is, allowing students to express political opinions today to further their self-development so that as adults they will be responsible members of society); Keiter, *supra* note 246, at 39 (arguing that in *Tinker* "[t]he Court recognized that although children might not presently participate in the political process, it is appropriate for the state through its schools to foster an appreciation and understanding on their part of the political and social milieu and the dynamics of change"). Commentators have observed that the extent to which *Tinker* suggests that students' free speech rights obviously flow from the right to communicate and to influence others on political issues and matters of public policy, the rights are illusory, for students who have not reached their eighteenth birthday have diminished legal capacity and do not enjoy the right to vote. *See* Garvey, *supra* note 259, at 338-39; Mark Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L.F. 746, 753-54 & n.36.

289. *See supra* notes 260-67 and accompanying text. Moreover, the Court apparently was not convinced that the state actually was protecting students from the exploitative practices of others and that school authorities were seeking to assist parents by its policy, but was persuaded that the students were sufficiently mature to face and consider the political viewpoints that the school sought to suppress. *See* Keiter, *supra* note 246, at 41-42.

290. *Cf.* Keiter, *supra* note 246, at 43 (the *Ginsberg* line of cases does not undercut the rationale of *Tinker*).

291. *Tinker*, 393 U.S. at 513. The Court did not provide examples of material disruption, substantial disorder, or invasions of the rights of others. *See* Levin, *supra* note 60, at 1662.

292. *Tinker*, 393 U.S. at 508; *see also id.* at 514 ("invasion of the rights of others" defined as intruding into the lives of others).

293. Some have suggested that the "invasion of the rights of others" prong of *Tinker* requires the commission of a tortious act by one student against another, such as a battery

speech—can be regulated at that point when it disrupts the learning processes or intrudes upon other students and affects their feelings of security.

Tinker provides support for the regulation of hate speech in the public schools.[294] Under the first prong of the standard established in that case, elementary and secondary school officials may proscribe hate speech and sanction abusive epithets and slurs when they have knowledge of facts causing them to anticipate (or to forecast)[295] that such speech will materially disrupt classwork or result in substantial disorder.[296] Several lower courts, applying the disruption prong, have held that certain expressive symbols, school songs, and team names, the Confederate flag, the song "Dixie," and the name "Rebels," for example, may be proscribed due to their offensiveness and potentially disruptive presence in the educational setting.[297]

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or libel, resulting in potential liability for the school. *See, e.g.*, Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 280-90 (1988) (Brennan, J., dissenting); Note, *supra* note 65, at 640-41. The Supreme Court, however, has not adopted this position. *See Kuhlmeier*, 484 U.S. at 273 n.5 (Because the Court did not rely on the *Tinker* standard in resolving the issue presented, it did "not decide whether the Court of Appeals correctly construed *Tinker* as precluding school officials from censoring student speech to avoid 'invasion of the rights of others,' . . . except where the speech could result in tort liability to the school.").

294. In his dissenting opinion in *Tinker*, Justice Black, in the context of *Meyer* and the rights of teachers to teach the subjects of their choice, commented on derogatory epithets and slurs, strongly urging that they have no place in elementary and secondary schools:

> The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semite carries with him a complete freedom of speech and religion in a Catholic church or Jewish synagogue. . . . It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases.

Tinker, 393 U.S. at 521-22 (Black, J., dissenting) (citations omitted).

295. *See id.* at 509, 514 (In order to regulate student speech, school officials must articulate facts showing that the forbidden speech "would" result in a material or substantial disruption or the invasion of the rights of others or that they have reason "to anticipate" or "to forecast" such consequences.).

296. *Cf.* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 687-88 (1986) (Brennan, J., concurring) (Public school officials may discipline student for lewd and vulgar expression in order to prevent disruption of school educational activities.). Professor Diamond has asserted that the Court in *Tinker* viewed disruption, as a criterion triggering permissible school regulation of speech, in a purely physical sense, when in fact disruption of the school environment may be other than physical in nature. *See* Diamond, *supra* note 244, at 485. For this reason, he has argued that educational and psychological disruption also are sufficient to trigger constitutionally permissible regulation, for school administrators have a "right to protect students from exposure to pernicious values." *Id.* at 502-05 (footnote omitted). Justice Brennan's position in *Kuhlmeier* is strikingly similar to Professor Diamond's argument.

297. *See, e.g.*, Augustus v. School Bd., 507 F.2d 152 (5th Cir. 1975) (noting that under *Tinker* a public school may proscribe the use of the Confederate flag as a school symbol and the use of the name "Rebels" in conjunction with athletic teams and extracurricular activities because of racial tension and potential disruption); Melton v. Young, 465 F.2d 1332 (6th Cir. 1972) (holding that under *Tinker* schools may prohibit the use of offensive symbols, like the Confederate flag as the school flag, "Rebels" as the team name, and "Dixie" as the school pep song, in school circumstances filled with racial tension, and may

The second prong of the *Tinker* standard also provides a regulatory justification for the public schools, on the premise that abusive epithets and slurs intrude into the lives of the students against whom they are directed, severely and unfairly restricting their sense of security and their right to be let alone. On this view, the detrimental psychological impact of hate speech—the immediate affront to dignity and loss of security and the long-term feelings of inferiority—and the state's compelling interest in protecting children from such psychological harm receive full recognition.

A plausible rejoinder to the conclusion that *Tinker* provides the public schools with ample constitutional authority to regulate hate speech is the argument that such a conclusion is contrary to *Tinker*'s central tenet: schools may not confine student expression to "those sentiments that are officially approved."[298] A prohibition on hate speech, abusive epithets calculated to convey negative messages and to hurt, however, is not like the prohibition in *Tinker*, which singled out a particular symbol connected to a particular political issue.[299] The Court in *Tinker* expressly noted that the school policy in issue did not purport to prohibit the wearing of all politically-charged symbols, but instead proscribed only the wearing of black armbands to oppose the United States' involvement in Vietnam.[300] The Court's concern in *Tinker* with efforts by school officials to restrict student expression on specific political or controversial issues simply is not implicated by hate speech regulations prohibiting all abusive epithets and slurs based upon race, ethnic origin, religion, sex, and sexual preference.

In thinking about hate speech and the public schools, we must keep in mind that abusive epithets and slurs are different from

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suspend students for wearing clothing bearing the Confederate flag, on the ground of preventing potential danger and disruption), *cert. denied*, 411 U.S. 951 (1973); Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970) (upholding, under *Tinker*, a school's rule prohibiting students from wearing all buttons supporting a cause or bearing messages unrelated to their education—including buttons bearing political messages and racially divisive messages—because of the possibility of disorder), *cert. denied*, 401 U.S. 948 (1971).

298. *Tinker*, 393 U.S. at 511; *cf.* West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (public schools may not compel students to salute the flag).

299. *See Tinker*, 393 U.S. at 510-11. Accordingly, hate speech regulations are not viewpoint-specific. *Contra* American Booksellers Ass'n v. Hudnit, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (court struck down an anti-pornography ordinance because the court concluded that it discriminated on the basis of viewpoint); Thomas C. Grey, *Discriminatory Harassment and Free Speech*, 14 HARV. J.L. & PUB. POL'Y 157, 161 (1991) (prohibitions on hate speech like the Stanford regulation draw objections from civil libertarians because they seem to violate neutrality: they are not content-neutral and they appear to lack viewpoint neutrality); *cf.* Sherry, *supra* note 66, at 933 (almost all of the university regulations adopted to punish hate speech "are extremely broad and obviously content-based").

300. *Id.*

other forms of speech in terms of the speaker's purpose and motivation and the effect of the spoken words on the listener. Abusive epithets are different because they are calculated to inflict injury and they do inflict injury. In recognizing hate speech as harmful and in seeking its regulation, however, we need not dispense with our belief that freedom of expression for public school students in a democracy is fundamental and good. Rather, as *Tinker* instructs, we must ensure that school officials take action to proscribe abusive language when, in fact, it is abusive or disruptive.

The *Tinker* requirement of balancing the First Amendment rights of elementary and secondary students against the public schools' need to maintain a certain kind of order within the learning environment no longer remains the sole analytic model. In *Bethel School District No. 403 v. Fraser*[301] the Court pursued a new doctrinal approach. There a high school student delivered a campaign speech nominating a classmate for student office.[302] The speech, given during a school-sponsored assembly at which approximately six hundred high school students between the ages of fourteen and eighteen were present, made reference to the student candidate "in terms of an elaborate, graphic, and explicit sexual metaphor."[303] Acting pursuant to a school regulation prohibiting the use of obscene and profane language,[304] and after a disciplinary hearing during which the hearing officer determined that the speech was "indecent, lewd, and offensive, to the modesty and decency of many of the students and faculty in attendance at the assembly,"[305] school officials suspended the student and removed his name from the list of candidates for graduation speaker.[306]

The Supreme Court upheld the actions of the school officials, holding that the First Amendment does not prevent a public

301. 478 U.S. 675 (1986).

302. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 677 (1986).

303. *Id.* at 677-78.

304. *Id.* at 678. The school disciplinary rule provided in full as follows: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.*

305. *Id.* at 678-79.

306. *See id.* The hearing officer affirmed the school officials' decision that suspension was the appropriate discipline. *See id.* at 679. Matthew Fraser, the student who gave the speech, then brought suit in federal district court, alleging a violation of § 1983 of Title 42 of the United States Code. *See id.* The district court held that the school's disciplinary actions violated Fraser's First Amendment right to freedom of speech, that the school's regulation was unconstitutionally vague and overbroad, and that the school's removal of Fraser's name from the list of candidates for graduation speaker constituted a violation of the due process clause of the Fourteenth Amendment. *See id.* The Ninth Circuit affirmed the judgment of the district court, holding that *Tinker* controlled and that Fraser's speech was indistinguishable from the armbands in that case. *See id.* at 679-80.

school from disciplining a student for giving a lewd and vulgar speech at a school assembly.[307] The Court's reasoning proceeded along two lines. First, the Court rejected out of hand the argument that *Tinker* was controlling, finding that it was incorrect to equate lewd and obscene speech with the constitutionally protected political message of the armbands in *Tinker*.[308] Moreover, the Court concluded that, unlike the school action in *Tinker*, the school disciplinary action was unrelated to any political viewpoint.[309] Second, the Court reasoned that while the fundamental values of democratic society require tolerance of diverse religious and political views, even those views that are considered by many to be unpopular, those fundamental values also mandate "tak[ing] into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students."[310] In other words, the fundamental values "disfavor the use of terms of debate highly offensive or highly threatening to others."[311] Against this backdrop, the Court held that lewd and vulgar speech within the public schools was wholly inconsistent with the values of public school education and an impediment to the fulfillment of the basic educational mission.[312] School officials, therefore, appropriately had disassociated the school from the lewd and vulgar content of the student's speech.[313]

The Court's discussion in *Fraser* about the importance of protecting the sensibilities of students and the permissibility of proscribing words that are highly offensive or highly threatening to students has important implications for the hate speech debate. Indeed, the expansive language of the decision powerfully suggests that the Court would view hate speech in the public schools in the same way that it views lewd and vulgar speech within the public schools, for the student who directs an abusive epithet

307. *See Fraser*, 478 U.S. at 685.

308. *See id.* at 680.

309. *Id.* at 685.

310. *Id.* at 681. The Court added that "[e]ven the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences." *Id.*

311. *Id.* at 683.

312. *See Fraser*, 478 U.S. at 685-86.

313. *See id.* In his concurring opinion, Justice Brennan applied the disruption prong of the *Tinker* standard and concluded that:

> in light of the discretion school officials have to teach high school students how to conduct civil and effective public discourse, and to prevent disruption of school educational activities, it was not unconstitutional for school officials to conclude, under the circumstances of this case, that [the student's] remarks exceeded permissible limits.

Id. at 687-88 (Brennan, J., concurring).

against another intends to offend or to threaten, precisely because of the other's sensibilities.

Yet a third doctrinal approach, distinct from both *Tinker* and *Fraser*, was employed by the Court in *Hazelwood School District v. Kuhlmeier*.[314] In *Kuhlmeier* the Court held that with respect to school-sponsored expression, such as "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school,"[315] that is, activities that fairly may be characterized as part of the curriculum,[316] school officials may regulate the style and the content of expression "so long as their actions are reasonably related to legitimate pedagogical concerns."[317] When a school acts in its capacity as a publisher or an editor, when it in some sense is the speaker, it may "set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the 'real' world—and may refuse to disseminate student speech that does not meet those standards."[318] Accordingly, a school may disassociate itself from speech that substantially interferes with the school's work; that impinges upon the rights of other students; that is ungrammatical, poorly written, and inadequately researched; that is vulgar, profane, or unsuitable for student audiences; and, significantly, that is *"biased or prejudiced."*[319]

Student expression that is biased or prejudiced—including hate speech—may be regulated when it is part of the school curriculum or bears the school's imprimatur. The Court's introduction

314. 484 U.S. 260 (1988). The Court noted that it was not applying the *Tinker* standard. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270-71 (1988). In dissent, Justice Brennan argued that the Court inappropriately abandoned the *Tinker* test. *Id.* at 282-83 (Brennan, J., dissenting).

315. *Id.* at 271.

316. *See id.*

317. *Id.* at 273 (footnote omitted). In *Kuhlmeier* the school principal directed the advisor of a school-sponsored student newspaper to delete two pages containing stories on divorce and pregnancy. *Id.* at 264. The Court upheld his actions, holding that the newspaper was not a public forum because school officials never established it for indiscriminate use by the public or students, and, thus, school officials could regulate its content in any reasonable manner. *See id.* at 269-70.

318. *Id.* at 271-72.

319. *Kuhlmeier*, 484 U.S. at 271 (emphasis added). Even Justice Brennan in dissent agreed that educators need not sponsor the publication of speech that is " 'ungrammatical, poorly written, inadequately researched, biased or prejudiced,' or that falls short of the 'high standards for . . . student speech that is disseminated under [the school's] auspices . . . .' " *Id.* at 283 (Brennan, J., dissenting) (quoting the majority in *Kuhlmeier*, 484 U.S. at 271). He argued that such expression in a student newspaper, for example, could be regulated under *Tinker*, for it would materially disrupt the newspaper's curricular function. *Id.* at 283-84.

of public forum analysis into the First Amendment jurisprudence of the public schools stands, and constitutes a distinct doctrinal approach. It expands on the *Fraser* principle that the public schools have the authority to disassociate themselves from certain forms of student expression. *Kuhlmeier* thus provides additional constitutional approval for the regulation of hate speech in the public schools.

Doctrine established by the Supreme Court to govern the operation of the public schools vis-a-vis the First Amendment consists of an array of analytic models. As the above discussion has sought to show, prevailing constitutional doctrine affords school officials with several regulatory rationales and sufficient latitude to prohibit abusive epithets and slurs should they so choose. The harms caused by hate speech and the educational mission of the public schools, a mission that includes teaching students about respect for others and fostering pluralism and equality, are persuasive reasons for concluding that schools ought to regulate hate speech within the school environment.[320]

IV. CONCLUSION

Hate speech affects people in negative ways. When abusive epithets and slurs are a part of playground, lunchroom, hallway, or classroom communications, elementary and secondary public school students are harmed in significant ways and the learning process is impaired. The presence of hate speech also means that the public school, while honoring First Amendment norms of free speech, has failed to promote the constitutional value of equality, as well as other highly prized values such as civility and tolerance, to the full extent possible. Hate speech regulations are premised on the underlying theory that equality and the other values of our society must be furthered, lest our commitment to free speech principles overpower our commitment to other important values.

To date, the hate speech conundrum has been viewed in the context of society and the context of post-secondary educational institutions. Proponents of regulation have sought to make us

320. Many commentators have concluded that hate speech has no place in the public schools and should be subject to regulation. *See, e.g.*, Diamond, *supra* note 244, at 502; Freeman, *supra* note 250, at 60 n.360; Garvey, *supra* note 259, at 361-64; Smolla, *supra* note 9, at 205-06. In addition, the American Bar Association's Juvenile Justice Standards Project would allow restrictions on student speech that "advocates racial, religious, or ethnic prejudice or discrimination or seriously disparages particular racial, religious, or ethnic groups." INSTITUTE OF JUDICIAL ADMINISTRATION, AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS PROJECT, STANDARDS RELATING TO SCHOOLS AND EDUCATION 4.2(C) & Commentary 84-91 (1977).

think about conventional First Amendment doctrines in new ways. The debate has made us feel uncomfortable, not because we view equality as less important than free speech, but because we value them both and because the idea of restrictions on speech is contrary to our strongly held liberal beliefs. Our uneasiness with regulation, like our uneasiness with the tension between the libertarian and the communitarian visions, is informative, however, for it clearly reveals that free speech as we currently know it is neither neutral nor cost-free: to allow hate speech is to permit some to speak freely at the expense of others. This outcome is worrisome when we consider that it is imposed on the weaker and more vulnerable by the stronger. At a minimum, the hate speech conundrum teaches that we must not be cavalier about neutrality and the First Amendment right of freedom of expression.

The public schools, however, do not present the same concerns to the same extent. They are different in important respects from the world-at-large and from colleges and universities. Largely due to the less developed nature of children and their lack of capacity for autonomous decision making, in addition to the unique function of the public schools, normative educational theory and constitutional law accord public school students fewer rights than adults and do not demand complete neutrality on the part of the schools. Precisely for this reason, and despite any uneasiness that we may harbor concerning the promulgation of such regulations at colleges and universities, the proposed justifications for college and university hate speech regulations provide ample authority for elementary and secondary public school hate speech regulations. Moreover, good educational policy founded upon principles of nondiscrimination and nonrepression requires that the public schools prohibit abusive epithets and slurs based upon race, ethnic origin, religion, sex, or sexual preference in elementary and secondary public schools. *Tinker*, *Fraser*, and *Kuhlmeier* provide no obstacle to the implementation of hate speech regulations. To the contrary. Their rationales support public school efforts to provide environments for learning and to safeguard the sensibilities of elementary and secondary students. We can implement hate speech regulations in the public schools, regulations designed to protect students and to encourage learning, and yet remain true to our liberal principles of freedom of expression.